EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 11399

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & CO., a corporation,

Appellant,

vs.

FRED HARTLEY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

INDEX TO EXHIBITS.

In the United States District Court
Southern District of California
(Central Division)

No. 5103-M

FRED HARTLEY,

Plaintiff,

vs.

SEARS, ROEBUCK & CO., a corporation, ZENITH RADIO CORPORATION, FIRST COMPANY, a corporation, SECOND COMPANY, a corporation, THIRD COMPANY, a partnership, DOE ONE and DOE TWO, co-partners, DOE THREE, DOE FOUR and DOE FIVE,

Defendants.

CERTIFIED COPY OF RECORD FOR REMOVAL

In the Superior Court of the State of California in and for the County of Los Angeles
No. 508900

FRED HARTLEY,

Plaintiff,

v.

SEARS, ROEBUCK & CO., a corporation, ZENITH RADIO CORPORATION, FIRST COMPANY, a corporation, SECOND COMPANY, a corporation, THIRD COMPANY, a partnership, DOE ONE and DOE TWO, co-partners, DOE THREE, DOE FOUR and DOE FIVE,

Defendants.

COMPLAINT FOR DAMAGES
(Personal Injury)

Plaintiff complains of defendants and for cause of action alleges as follows:

I.

That the true names and capacities of the defendants herein referred to as First Company, Second Company, Third Company, Doe One, Doe Two, Doe Three, Doe Four and Doe Five are unknown to the plaintiff at this time, and plaintiff will ask leave of court to amend this complaint to show their true names when they have been ascertained.

II.

That Sears, Roebuck & Co., is a New York corporation, authorized to do business in the State of California, and is doing [2] business in the County of Los Angeles, State of California; that Zenith Radio Corporation is a corporation organized and existing under and by virtue of the laws of some state, and is authorized to do business in the County of Los Angeles, State of California; that First Company and Second Company are corporations organized and existing under and by virtue of the laws of some state, and is authorized to do business in the County of Los Angeles, State of California.

III.

That on or about the 13th day of October, 1945, at or about the hour of 8:15 P. M. on said day, on the premises known as the Sears, Roebuck & Co. store located at 2650 East Olympic Boulevard, in the County of Los Angeles, State of California, the defendants, and each of them, so carelessly, recklessly and negligently placed a foreign substance in plaintiff's left ear as to block the passage of

the canals of said ear and the ear orifice, and so as to injure the plaintiff as hereinafter set forth.

IV.

That as a direct and proximate result of said carelessness, recklessness and negligence on the part of the defendants, and each of them, plaintiff was rendered sick and sore, and was caused excruciating pain and was caused to suffer an infection in and about his left ear at or near the brain, and other internal injuries, as well as a severe shock to plaintiff's nervous system, all to the damage of plaintiff in the sum of Ten Thousand Dollars ($10,000.00).

V.

Plaintiff is informed and believes, and therefore alleges, the fact to be that his said injuries are permanent in their nature and will render him permanently disabled through the remainder of his natural life.

VI.

That as a direct and proximate result of the said careless- [3] ness, recklessness and negligence of the defendants, and each of them, and the said injuries inflicted upon the plaintiff, Fred Hartley, plaintiff has incurred a hospital bill for his care in a sum unknown to plaintiff at this time, and has incurred reasonable bills for surgeons' care and attention and for nurses' care and attention and for x-rays and for medicines, and plaintiff is informed and believes and therefore alleges that he will incur further bills in the treatment of his injuries, and plaintiff will ask leave of court to amend this complaint to show the true and correct amount of said special damages when such amounts are ascertained.

VII.

That at all times herein mentioned the defendants Doe Three, Doe Four and Doe Five were acting as the agents, servants and employees of the defendants Sears, Roebuck & Co., a corporation, Zenith Radio Corporation, First Company, a corporation, Second Company, a corporation, and Third Company, a partnership, and were acting within the course and scope of said employment.

And by Way of a Second, Separate and Distinct Cause of Action Against the Defendants, and Each of Them, Plaintiff Alleges as Follows:

I.

Repeats and realleges as though set forth in full, Paragraphs I, II and VII of his first cause of action.

II.

That at all times herein mentioned, the defendants Sears, Roebuck & Co., a corporation, Zenith Radio Corporation, a corporation, First Company, a corporation, Second Company, a corporation, and Third Company, a partnership, maintained and operated a hearing aid sales and fitting department located in certain premises belonging to the defendant Sears, Roebuck & Co., a corporation, and located in the City of Los Angeles, County of Los Angeles, State of [4] California;

That at all said times, the defendants, and each of them, held themselves out to the public to be competent and skillful in the work incident to the conduct and opera-

tion of a hearing aid sales and fitting department and in the work of what is commonly known as fitting hearing aids or mechanical devices to the ears and heads of any members of the public who might seek to the goods, wares, merchandise and services of said defendants, and any of them, and for a compensation, the goods, wares, and merchandise so bargained and sold and the services so rendered in connection therewith.

III.

That on or about the 13th day of October, 1945, in said hearing aid sales and fitting department located on the premises of the defendant Sears, Roebuck & Co., a corporation, as herein set forth in Paragraph II of this complaint, plaintiff employed the defendants, and each of them, for a compensation, to sell to plaintiff and fit in plaintiff's ears, an electric hearing aid or device, said device being then and there bargained and sold by said defendants, and each of them, and said fitting to the human ear being a service rendered to any person so buying said hearing aids, as herein set forth.

IV.

That the defendants, and each of them, entered upon the performance of said employment and said sale, and did pretend and attempt to fit a certain hearing device in the ear and head of plaintiff in consideration of the sale to plaintiff of said hearing aid and/or device.

V.

That at said time and place as aforesaid, and while attempting to and pretending to fit said hearing aid, said defendants, and each of them, did negligently, carelessly, incompetently and unskillfully undertake the operation of fitting said electric hearing [5] aid or device on or about the head and ear of plaintiff; that by reason of the negligence, carelessness, incompetence and unskillfull conduct of the defendants, and each of them, as aforesaid, a certain foreign substance became permanently lodged and fixed in plaintiff's left ear so as to block the passage of the canals of said ear and the ear orifice;

That as a direct and proximate result of said carelessness, negligence, incompetence and unskillful conduct upon the part of the defendants, and each of them, plaintiff was rendered sick and sore and was caused excruciating pain and was caused to suffer an infection in and about his left ear at or near the brain, and other internal injuries, as well as a severe and serious shock to plaintiff's nervous system, all to plaintiff's damage in the sum of Ten Thousand Dollars ($10,000.00).

VI.

That as a direct and proximate result of the said carelessness, negligence, incompetence and unskillful conduct of the defendants, and each of them, and as a result of the injuries inflicted upon him, plaintiff has incurred a hospital bill, and has incurred reasonable bills for surgeons' and nurses' care and reasonable sums for x-rays and medicines, and plaintiff has been informed and be-

lieves, and therefore alleges, that he will incur further bills for the treatment of his injuries, and plaintiff asks leave of court to amend this complaint to show the true and correct amount of said sums when such amounts are ascertained.

VII.

That at all times herein mentioned, the defendants, and each of them, held themselves out, and held out their agents, servants and employees, to members of the general public as being persons possessed of skill in fitting those certain electric hearing aids and/or devices sold by defendants, and *each them;* that the defendants, and each of them, represented themselves and their [6] employees to be possessed of that degree of skill in the fitting of electric hearing aids and/or devices as other persons engaged in the fitting of electric hearing aids and/or devices in said community in which defendants, and each of them, and their servants, agents and employees, carried on their profession.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of Ten Thousand Dollars ($10,000.00), general damages, for such special damages as may hereafter be proved and allowed, for his costs of court, and for such other and further relief as the court may deem proper.

CHASE, BARNES & CHASE
By Stanley N. Barnes
Attorneys for Plaintiff

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES

To the Honorable, the Superior Court of the State of California, in and for the County of Los Angeles:

Sears, Roebuck and Co., a corporation, appearing specially herein for itself alone and for no other defendant herein, for the sole and only purpose of having the above entitled cause removed to the District Court of the United States, files this, its petition for the removal of the said cause from the above entitled court, in which it is now pending, to the District Court of the United States for the Southern District of California, Ceneral Division, and in support of said petition respectfully shows:

I.

That the above entitled action was commenced and the [8] complaint therein filed in the above named court on the 28th day of December, 1945, and summons was issued on said date and said action is now therein pending. Summons and complaint were served upon defendant and the time within which petitioner herein is required to answer or plead to plaintiff's complaint as required by the laws of the State of California and the practice of this court has not yet expired. Defendant has not heretofore appeared in said action.

II.

That the above entitled action is one of a civil nature at law over which the District Courts of the United States have original jurisdiction. That Fred Hartley, plaintiff in said action, was at the time of the commencement of said action and now is a citizen of the State of California and a resident of the County of Los Angeles in said State. That Sears, Roebuck and Co., one of the named defendants in said action, was at the time of the commencement of said action and still is, a corporation organized under and existing by virtue of the laws of the State of New York, with its principal place of business in the City of New York in said State, and then was and still is a citizent and resident of the State of New York. That Zenith Radio Corporation, the other of the named defendants in said action, was at the time of the commencement of the action and still is, a corporation organized and existing under and by virtue of the laws of some state other than the State of California, with its principal place of business in the City of Chicago, Illinois, and then was and still is a non-resident of the State of California.

III.

That the value of the matter in controversy in said action exceeds $3,000, exclusive of interest and costs, as appears from the allegations of plaintiff's complaint.

IV.

Petitioner presents herewith a bond with good and sufficient [9] surety that it will enter in the District

Court of the United States for the Southern District of California, Central Division, within thirty days of the date of filing of this petition, a certified copy of the record in this suit and that it will pay all costs that may be awarded by said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

V.

That prior to the filing of this petition and of said bond for the removal of said cause, written notice of intention to file the same was given to the plaintiff by petitioner as required by law, a true copy of which, with proof of service of the same, is attached hereto.

Wherefore, petitioner prays that this Court proceed no further herein except to make an order of removal as required by law and to accept said surety and bond and to cause the record herein to be removed into said District Court of the United States within and for the Southern District of the State of California, Central Division, according to the statute in such cases made and provided.

Dated: January 10th, 1946.

JOHN L. WHEELER
Attorney for Petitioner

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 12, 1946. [10]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL TO UNITED STATES DISTRICT COURT

Good cause appearing and there having been presented to the Court a petition and bond in due form for removal of the above-entitled action to the District Court of the United States for the Southern District of California, Central Division, and it further appearing that written notice of said petition and bond for removal has been given plaintiff in the above-entitled action prior to filing the same,

Now, Therefore, It Is Ordered:

1. That said petition for removal be and the same hereby is granted, that the above-entitled action be and the same hereby is removed to the District Court of the United States for the Southern District of California, Central Division. [11]

2. That said bond presented herewith be and the same hereby is approved.

3. That the Clerk of this Court be and he hereby is ordered and directed to prepare a certified transcript and copy of the record herein to be filed with the said District Court of the United States in the manner and form as provided by law in such case.

4. That all proceedings in this Court in said cause be stayed.

Dated: January 12th, 1946.

W. TURNEY FOX
Judge of the Superior Court

[Endorsed]: Filed Jan. 12, 1946. [12]

State of California
County of Los Angeles—ss.

No. 508900

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint, Notice of filing and hearing petition for removal, Petition for Removal, Bond on Removal and Order of Removal to the United States District Court, Southern District of California (Central Division), in the action of Fred Hartley vs. Sears, Roebuck & Company, a corporation, et al., to be a full, true and correct copy of all of the original documents on file and/or or record in this office in the above entitled action to and including the date of filing the signed order for Removal to the said United States District Court, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 1st day of February, 1946.

[Seal] J. F. MORONEY

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles

By E. Morris, Deputy [13]

[Endorsed]: Filed Feb. 2, 1946. [14]

[Title of District Court and Cause.]

No. 5103-M Civil

ANSWER TO COMPLAINT

Comes now the defendant, Sears, Roebuck and Co., and answering for itself alone and not for any other defendant herein, admits, denies and alleges as follows:

I.

Answering Paragraph II, admits the allegations of said paragraph. Alleges that the correct name of this defendant is Sears, Roebuck and Co.

II.

Answering Paragraph III, denies generally and specifically said paragraph and each and every allegation therein contained. [15]

III.

Answering Paragraph IV, denies generally and specifically said paragraph and each and every allegation therein contained. Further answering said paragraph, denies that the plaintiff was damaged as alleged, or at all, or in the amount alleged, or in any other amount.

IV.

Answering Paragraphs V, VI and VII, denies generally and specifically said paragraphs and each and every allegation therein contained.

Answering Plaintiff's Second, Separate and Distinct Cause of Action, This Answering Defendant Admits, Denies and Alleges as Follows:

I.

Answering Paragraph I, admits the allegations of Paragraph II of plaintiff's First Cause of Action realleged in said paragraph; denies Paragraph VII and each and every allegation therein contained of said First Cause of Action realleged in said paragraph.

II.

Answering Paragraph II, admits that this answering defendant was engaged in the sale of hearing aids at its retail store situated at 2650 E. Olympic Boulevard in the City of Los Angeles, State of California. Except as herein admitted, denies each and every allegation of said paragraph.

III.

Answering Paragraph III, admits that on or about the 13th day of October, 1945, this answering defendant sold to plaintiff an electric hearing aid. Except as herein admitted, denies said paragraph and each and every allegation therein contained. [16]

IV.

Answering Paragraph IV, admits that a hearing aid device was fitted in the ear of plaintiff. Except as herein admitted, denies said paragraph and each and every allegation therein contained.

V.

Answering Paragraphs V and VI, denies generally and specifically said paragraphs and each and every allegation therein contained. Further answering said paragraphs, denies that the plaintiff was damaged as alleged, or at all, or in the amount alleged, or in any other amount.

VI.

Answering Paragraph VII, denies generally and specifically said paragraph and each and every allegation therein contained.

For a Further, Separate, and Second Defense, Defendant Alleges:

I.

That any injury or damage sustained by the plaintiff at the time alleged was caused or contributed to by the failure of the plaintiff to exercise any care or protection for his own safety whatever.

Wherefore, this answering defendant prays that said action be dismissed, and that it recover its costs and disbursements hereof.

JOHN L. WHEELER

Attorney for Defendant Sears, Roebuck and Co.

Dated: February 6th, 1946. [17]

[Affidavit of Service by Mail.] [18]

[Verified.]

[Endorsed]: Filed Feb. 7, 1946. [19]

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY PLAINTIFF

Plaintiff's
Requested Instruction
No. 8

Instruction No. .....

The Court instructs the jury that in estimating the plaintiff's damage, if the jury find for the plaintiff, it is proper for the jury to estimate the effect of the injuries in the future upon plaintiff's physical condition, if any, as well as the effect it has had upon the plaintiff already, and the bodily pain and suffering, and the mental suffering, past, present and future, endured by him as a result of the injuries received by him, and all necessary expenses and damages, past, present and future, such as expenses for medicine, medical and surgical attention, hospital and nurses, to the reasonable value thereof, which the jury believes from the evidence he has incurred, or in the future will incur by reason of said injuries and directly caused thereby.

Not Given: except as covered. McCormick, J.
~~Refused:~~ [21]

Plaintiff's
Requested Instruction
No. 9

Instruction No. .....

The Court instructs the jury that if you find that the plaintiff is entitled to recover in this action, the amount of recovery is for you to determine from all the facts in the case. Of course, you can not measure in dollars and cents

the exact amount plaintiff is entitled to, but it is for you to say, in the exercise of a sound discretion, from all the facts in the case, after considering and weighing all the facts in the case, without fear and without favor, and without passion and prejudice, what amount of money will reasonably compensate him for the damage and injury he has suffered, not exceeding the sum of Ten Thousand Dollars ($10,000.00) general damages prayed for in his complaint. If you find for the plaintiff in this case under the instructions given by the Court, and that the plaintiff has sustained damages as set forth in his complaint, then to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in business affairs of life. If you find for the plaintiff, then, in assessing plaintiff's damages, if any damages alleged in his complaint are proven, you have a right to take into consideration the nature, extent and character of the injury sustained by plaintiff so far as the same is shown by the evidence, if any such are shown, pain and suffering undergone by him in consequence of such injury, if any such is shown by the evidence, and assess his damages at such sum as in your judgment will compensate the plaintiff for such damages, injury, pain and suffering.

Not Given: except as properly covered. McCormick, J.

~~Refused:~~ [22]

Plaintiff's
Requested Instruction
No. 14

Instruction No. .....

~~You are hereby instructed that~~: If you should find for the plaintiff, then in fixing the sum in assessing the damages, you will be reasonable and just and fix such sum as will in your honest and deliberate judgment, compensate the plaintiff for his injuries, if any, he has sustained as a result of the fitting of the hearing aid. The elements entering into such damages are as follows:

1. Such sum as will reasonably ~~and fairly~~ compensate the said plaintiff for the necessary expenses, if any, that he has ~~incurred or~~ paid, ~~or which he is reasonably certain to incur or pay in the future, by reason of the plaintiff's injuries, if any,~~ for doctor bills, hospital bills, ~~x-ray pictures, ambulance service, nurse hire,~~ and medicines, ~~sundries and surgical supplies~~. not to exceed $23.00.

2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, or which he is reasonably certain to suffer in the future therefrom, if any.

The element with respect to the expense incurred to date hereof, if any, is subject of direct proof and must be determined by the jury from the direct evidence that they have before them. The element with respect to the pain and suffering, if any, of the plaintiff is left to the sound

discretion of the jury for their determination under all the evidence and circumstances in proof in this case.

~~In estimating the amount of general damages, you may consider what, before he sustained his injuries, if any, was the plaintiff's health and physical ability; also the extent to which, if at all, the injuries which he received, if any, are permanent in their character.~~

The general damages in all, however, that may be awarded to the plaintiff, cannot exceed the amount ~~alleged therefor,~~ sued for to wit, the sum of Ten Thousand Dollars ($10,000.00). The amount sued for is no criterion or tip as to the damages you may award, if any, but is merely a limit by and which you cannot go in any event.

Given: As modified. McCormick, J.

~~Refused:~~ [23]

Plaintiff's
Requested Instruction
No. 23

Instruction No. .....

The Court instructs the jury that if you find for the plaintiff, you will assess his damages at such a sum of money as in your opinion will be a reasonable and just compensation for the injuries he has sustained. In estimating the damages, you will take into consideration the physical and mental pain, if any, he has sustained

by reason of such injuries, if any; and if you believe from the evidence that plaintiff has not recovered and that his injuries are permanent, and that he will hereafter suffer pain and anguish therefrom, then you will take this into consideration in estimating the damages.

Not Given: McCormick, J.

~~Refused:~~ [24]

Plaintiff's
Requested Instruction
No. 25

Instruction No. .....

You are further instructed that in support of the general damages claimed by the plaintiff Fred Hartley, limited by the allegations of the complaint to a sum not in excess of Ten Thousand Dollars ($10,000.00), it is your duty, should you find in favor of the plaintiff and against the defendant, to award the plaintiff the special damages proved to have been paid or incurred by the plaintiff for hospital bills, doctor bills, nursing bills, and any other special damages which have arisen from the injury and been proven, and which the evidence discloses were reasonable and were necessarily incurred or paid by the plaintiff by reason of the fitting of the hearing aid on plaintiff on or about October 13, 1945.

Not Given: properly and sufficiently covered in charge. McCormick, J.

~~Refused:~~ [25]

Plaintiff's
Requested Instruction
No. 26

Instruction No. .....

You are instructed that while the expenses incurred or paid for by the plaintiff by reason of his injuries, including any doctor bills, is a matter of direct proof on the part of the plaintiff in this case, and must be established by evidence introduced at the trial, yet you are instructed that if the plaintiff is entitled to recover, in determining what he is entitled to recover for mental and physical pain and suffering which he has suffered, if any, you are not bound by direct proof as to the amount the plaintiff is damaged, and the only rule or law to govern you is your enlightened conscience as impartial jurors. In other words, if you find the defendant liable, you should award the plaintiff Fred Hartley for his pain and suffering such sum as your consciences dictate would be just compensation for the pain and suffering which he has undergone in the past and which he is reasonably certain to undergo in the future.

Not Given: except as covered. McCormick, J.

~~Refused:~~ [26]

Instructions Requested by Defendant
#7

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

Given McCormick, J.

Granted

Not Granted [27]

12

If your verdict should be for Plaintiff you should, in calculating his general damages, make no award for loss of earnings because there is no evidence of loss of earnings as a result of this accident. For the same reason you should make no award for loss of future earnings because there is no evidence that any earnings will be lost in the future as a result of this accident.

Given McCormick, J.

Granted

Not Granted [28]

13

If your verdict should be for the Plaintiff you must award him, in addition to his special damages, covered by another instruction, general damages to compensate him for his pain, suffering, and anxiety, if any, resulting from this accident. The evidence does not show any permanent impairment of plaintiff's hearing resulting from this accident and therefore, in fixing general damages, if you find for the Plaintiff, you should fix your award of general damages in such sum as will compensate Plaintiff for such pain, suffering and anxiety, if any, as you find that Plaintiff has suffered in the past as a result of this accident.

Not Given except as covered elsewhere. McCormick, J.

Granted

Not Granted

[Endorsed]: Filed May 9, 1946. [29]

[Title of District Court and Cause.]

OBJECTIONS TO INSTRUCTIONS REQUESTED BY PLAINTIFF

* * * * * * * * *

III.

Plaintiff's requested instruction number eight is unsupported by the evidence. There is no evidence that Plaintiff will be put to future expense as a result of this accident and there is no evidence of any permanent injuries resulting from this accident.

IV.

Plaintiff's instruction number nine is unsupported by the evidence because there is no evidence of damage to Plaintiff which would justify an award in the amount of ten thousand dollars ($10,000.00) as impliedly authorized in such instruction.

V.

Plaintiff's instruction number fourteen is unsupported by the evidence. There is no evidence that Plaintiff suffered permanent injuries. There is no evidence that Plaintiff will have future expense as a result of this accident. There is no evidence which would justify an award of damages in the amount of ten thousand dollars ($10,000.00). [30]

* * * * * * * * *

VIII.

Plaintiff's requested instruction number twenty-three is unsupported by the evidence. There is no evidence that as a result of this accident Plaintiff suffered permanent

injuries. There is no evidence that he will have future pain and suffering as a result of this accident.

IX.

Plaintiff's requested instruction number twenty-five is unsupported by the evidence because there is no evidence of damage to Plaintiff which would justify an award in the amount of ten thousand dollars ($10,000.00) as impliedly authorized in such instruction.

X.

Plaintiff's requested instruction number twenty-six is unsupported by the evidence because there is no evidence that Plaintiff will suffer in the future as a result of this accident.

* * * * * * * * *

[Endorsed]: Filed May 9, 1946. [31]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find for the Plaintiff, Fred Hartley, and against the Defendant, Sears, Roebuck & Company, and assess general damages in the sum of Three Thousand Dollars and special damages in the sum of Twenty-three Dollars.

Los Angeles, California
May 9th, 1946.

MILTON HOLDEN BERG
Foreman

[Endorsed]: Filed May 9, 1946. [32]

United States District Court
Southern District of California
Central Division

5103-M Civil

FRED HARTLEY,

Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Defendant.

JUDGMENT ON VERDICT

On the 8th day of May, 1946, this cause came on for trial before the court and a jury duly impanelled on said day; Chase, Barnes and Chase, Esqs., by Robert E. Moore, Jr., Esq., appearing as counsel for the plaintiff, and John L. Wheeler and John Sobieski, Esq., appearing as counsel for the defendant; and the trial having proceeded with on said 8th day of May, 1946, before the court and said jury, and during the trial of said cause, testimony having been adduced and exhibits admitted on behalf of the respective parties; and the parties having rested, and respective counsel having argued to the jury, was continued to and the court instructed the jury on the 9th day of May, 1946; and

On the 9th day of May, 1946, after the instructions of the court, said cause was submitted to the jury for its consideration and verdict; and after consideration thereof, the jury thereafter on said 9th day of May, 1946, having

returned into court, and after presenting its verdict, which was read by the Clerk, the court ordered the verdict as presented and read, filed and entered, and is as follows:

"In the District Court of the United States in and for the Southern District of California, Central Division

Fred Hartley, Plaintiff, vs. Sears, Roebuck & Company, a corporation, Defendant. No. 5103-M Civil

VERDICT

We, the Jury in the above-entitled cause, find for the Plaintiff, Fred Hartley, and against the Defendant, Sears, Roebuck & Company, and assess general damages in the sum of Three Thousand Dollars, and special damages in the sum of [33] Twenty-three Dollars.

Los Angeles, California
May 9th, 1946

MILTON HOLDEN BERG
Foreman."

Filed May 9, 1946. Edmund L. Smith, Clerk, by B. B. Hansen, Deputy Clerk.

Now, Therefore, by virtue of the law and by reason of the premises aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, Fred Hartley, do have and recover of and from the defendant, Sears, Roebuck & Company, a corporation, the sum of Three Thousand Dollars

($3,000.00) general damages, and special damages in the sum of Twenty-three ($23.00) Dollars, together with his costs to be taxed. Cost taxed at $63.60.

Dated: Los Angeles, California, May 10th, 1946.

PAUL J. McCORMICK
United States District Judge

Judgment entered May 10, 1946. Docketed May 10, 1946. Book 38, page 391. Edmund L. Smith, Clerk, by B. B. Hansen, Deputy.

[Endorsed]: Filed May 10, 1946. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sears, Roebuck and Co., defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 10th day of May, 1946.

Dated: June 29th, 1946.

JOHN L. WHEELER
JOHN G. SOBIESKI
Attorneys for Defendant.

[Endorsed]: Filed, mailed copy to Chase, Barnes & Chase, attys. for plf. Jul. 1, 1946. [35]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT RELIES AND DESIGNATION OF RECORD

POINTS ON WHICH APPELLANT RELIES

1. The evidence is insufficient to justify the verdict.

2. Excessive damages appearing to have been given under passion and prejudice.

3. Errors in law occurring at the trial in the following particulars:

(a) Failure to grant appellant's motion for a directed verdict.

(b) Instructing the jury, over appellant's objection, that in assessing general damages one element they should consider was the pain, if any, which plaintiff was reasonably certain to suffer in the future and [36] refusing to give the instruction requested by appellant that in assessing general damages the jury should compensate plaintiff only for such pain, suffering and anxiety, if any, as plaintiff suffered in the past.

(c) Instructing the jury, over appellant's objection, that the general damages they may award plaintiff may be as much as ten thousand dollars ($10,000.00).

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Dated: 19 July 1946.

JOHN L. WHEELER
JOHN G. SOBIESKI
Attorneys for Defendant and Appellant
Sears, Roebuck and Co. [38]

Received copy of the within document Jul. 20, 1946. Chase, Barnes & Chase, MD.

[Endorsed]: Filed Jul. 20, 1946. [39]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 39 inclusive contain full, true and correct copies of Complaint for Damages; Petition for Removal to the District Court of the United States; Order of Removal to United States District Court; Certificate of Clerk of the Superior Court to Removal Papers; Answer to Complaint; a Portion of the Requested Instructions; a Portion of the Objections to Instructions Requested by Plaintiff; Verdict; Judgment on Verdict; Notice of Appeal; Statement of Points and Designation of Record which, together with copy of the reporter's transcript of the trial on May 8 and 9, 1946, and the original exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $7.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of July, A. D. 1946.

(Seal) EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause.]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff: Chase, Barnes & Chase, by Robert E. Moore, Jr., Esq.

For the Defendant: John L. Wheeler, Esq., and John G. Sobieski, Esq.

Los Angeles, California, Wednesday, May 8, 1946. 10:00 A. M.

(A jury was duly empaneled and sworn.)

Mr. Moore: Your Honor please, I don't know whether an opening argument is in order in this matter, but I wish to state that I waive opening argument at this time. I think your Honor has stated the issues very well.

The Court: The defendant, if he desires to make a statement, may make it later on.

Mr. Wheeler: I have no desire to make it.

The Court: Very well.

Mr. Moore: I will call Mr. Hartley, please.

FREDERICK HARTLEY,

the plaintiff herein, called as a witness in his own behalf, having been previously sworn, was examined and testified as follows:

Direct Examination.

The Clerk: State your name, please.

The Witness: Frederick Hartley.

(Testimony of Frederick Hartley)

By Mr. Moore:

Q. Mr. Hartley, you are the plaintiff in this action against the Sears, Roebuck & Co.?

A. Yes, sir.

Q. Where do you reside?

A. 338 East Beverly Boulevard, Pico, California. [2*]

Q. What is your business or occupation?

A. I am a tool and diemaker.

Q. For how long have you been so employed?

A. All my life, from when I went to work when I was sixteen years old.

Q. Now, I notice that you are wearing a hearing aid. For how long a period of time have you been wearing an aid?

A. I bought my first hearing aid around 1939, 1940, or thereabouts. I don't remember the exact date.

Q. Now, on or about the 13th day of October, 1945, did you have occasion to go to Sears, Roebuck & Co.?

A. Yes, sir.

Q. Which one of their stores did you go to?

A. On Olympic Boulevard, their main store.

Q. What was your purpose in going there?

A. To buy batteries for my hearing aid.

Q. You were wearing a hearing aid at that time?

A. Yes, sir.

Q. What kind was it? A. An Acousticon.

Q. Was it an air conduction or a bone conduction type of hearing aid?

A. It was a bone conduction, one I held over my head.

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*Page number appearing at top of page of original Reporter's Transcript.

(Testimony of Frederick Hartley)

Q. On which side did you wear it?

A. Either side. [3]

Q. Prior to October 13, 1945, had you worn an air conduction hearing aid? A. No, sir.

Q. Now, will you please tell the court what you did on the 13th of October, 1945, with respect to the purchase of batteries?

A. Well, the wife and I went over to Sears, Roebuck to get some batteries, because we were going to a show and I wanted to be sure my hearing aid would work and the batteries wouldn't run down. So I went in to buy batteries.

Q. What time of the day was it when you went in there?

A. It was between 8:00 and 8:15 in the evening.

Q. What occurred, if anything, about that time?

A. I inquired where the batteries were, and I went over to the place where they sold the batteries and I asked the salesman there to sell me some batteries.

Q. Can you describe the place at which the batteries were located?

A. Well, it was on the first floor, as I walked in, and it said, "Optician Department" or "Optical Department," and I inquired where it was, and they told me, and I went over there and I inquired about the batteries and bought some batteries.

Q. Was the place enclosed or was it open?

A. It was enclosed. It was in the store proper. [4]

Q. I mean within the store itself was it enclosed either by partitions or was it open?

A. Not where I was buying the batteries. That was in a case right on the floor.

(Testimony of Frederick Hartley)

Q. What happened after that?

A. Well, I bought the batteries and the salesman asked me if I had tried the Zenith hearing aid, if I had had a demonstration.

Q. Do you know the person to whom you spoke at that time? A. Yes, sir.

Q. What was his name?

A. His name was Owen.

Q. Do you know his first name?

A. No, I only know his name by the receipts I got.

Q. Do you know whether he is in the court room at this time or not? A. He is, sir.

Mr. Moore: Mr. Owen, will you rise, please?

(The person indicated did as requested.)

Q. By Mr. Moore: Is this the gentleman to whom you refer? A. Yes, sir.

Q. Thank you. Now, will you tell us what happened after that? [5]

A. He told me about the Zenith hearing aid, that it was a wonderful hearing aid, he was wearing one himself, and would I like to try one.

Q. Now, at that point, did you ask Mr. Owen regarding a hearing aid?

A. Well, no. I just walked in the store and I bought the batteries, and there were Zenith batteries and other batteries there, and he asked me if I would like to try a Zenith hearing aid.

Q. Proceed, please.

A. I said, "Why, sure. Where do you try them?" Then there was a little enclosed room there to his left, and he said, "Right in here." So I went in there and he

(Testimony of Frederick Hartley)

tried the hearing aid on me, and he asked me if I was wearing a bone conduction, and I said, "Yes."

Q. Did you have your bone conduction hearing aid on at that time?

A. Yes, sir. So we tried the Zenith hearing aid, and he asked me how I liked it, and I said, "Fine," that I could hear a lot better with it.

Q. In trying on the Zenith hearing aid, what, if anything, was done preliminary to your trying it on?

A. What was it?

Q. Was anything done? Did he just place the aid on your head? [6]

A. We just took the aid and the wires that go with it, the battery, that connect the battery, and lay the hearing aid down, and you put the earphone or earpiece up to your head or ear, whatever the case is.

Q. Was that all that was done?

A. That's all.

Q. What, if anything, further occurred?

A. Well, we got to talking about the different kinds of hearing aids, with bone conduction and air conduction. He said, "Did you ever try air conduction?" I said, "Well, no. I have always had the bone conduction," the one that goes over here (indicating).

Q. Indicating over your head?

A. Over your head, and it is held with a band, and there is a lot of pressure all the time. So I mentioned that it would be nice if I could hear with the air conduction. He said, "Well, Zenith has a standard earpiece, and" he said, "it doesn't—it only costs $3.00 extra." So I says, "If that is all it costs, I might as well buy that too."

(Testimony of Frederick Hartley)

So I was trying that on, and he says, "Well," he says, "they generally have a mold made so they can hear much better, because it fits your ear." So I decides to have a mold made.

Q. What did you tell him in that regard?

A. I told him I would have a mold made. And I says, "Where do you get them?" He says, "We make them." I asked [7] him if they made them right in there. He said, "We make the impression right here, and you get it in four or five days."

Q. At that time did he tell you how the impression was made? A. No, sir.

Q. What, if anything, further occurred?

A. Then I decided to have a mold made, and I asked him how much it was. He says, "$6.00." So I says, "All right, I will buy one."

Q. Now, may I ask you at this point whether the mold was for your left ear or your right ear?

A. It was for my right ear.

Q. What, if anything, had you said to him regarding your right ear?

A. He asked me which ear did I hear best out of, and I told him my left ear. So, naturally I had a mold made of my right ear.

Q. All right. What was done in that regard?

A. Well, he told me to lay my head down on the pillow on the table or on the desk there, and I did.

Q. Was this table in this enclosure that you refer to?

A. Yes, sir.

(Testimony of Frederick Hartley)

Q. Now, did Mr. Owen tell you who he was, or what relationship, if any, he had to Sears, Roebuck? [8]

A. No. He just told me he wears one himself, and he is selling the hearing aid, and that's all.

Q. All right. You say you laid your head down on the table? A. On a pillow.

Q. Will you explain what you did in that regard?

A. Well, I was facing him, like I am facing you now, and he was on my left. He puts a pillow on the table, and I laid my head down, my left side of my head down and face the wall, and from there he started working on my ear.

Q. What did he do in that regard, if you know?

A. I couldn't tell you. My head was down, and I was just letting him do what he wanted.

Q. Well, during the process that went on, did he talk to you? A. Well, yes, he was—

Q. Did he tell you what he was doing?

A. Well, no. He was just walking around there, and I can't remember what the conversation was, what he says.

Q. What, if anything, did you feel?

A. Did I think?

Q. No. What, if anything, did you feel as he was working there?

A. Well, I felt him touching my ear, my head, and that's all. [9]

Q. Did he tell you at that time how he was making the mold? A. Oh, no, sir.

Q. Did he explain to you what it was for?

A. No, sir.

(Testimony of Frederick Hartley)

Q. All right. What happened after that?

A. Well, he got all through, and I says, "Well, that didn't take long." He says, "No." Then I says, "Well, I might as well have one made of the other ear too, so I can change off." I said, "Would that be a good idea?" And he says, "Yes."

Q. At that time did you see any mold?

A. Well, I can't recollect it now, because I have seen the one they sent me. I don't remember whether I seen it when I was there or not. I just didn't notice.

Q. All right. Now, what happened?

A. Well, then he says, "Well, it is getting late. We haven't much time," he says, "but if we hurry up, we can get through in time. It is getting late."

Q. Did he say what time they closed?

A. He said at 9:00 o'clock they closed.

Q. Do you know what time it was when you had this conversation regarding hurrying up?

A. No. What time it was, exactly the right time?

Q. Yes. [10] A. Oh, no.

Q. Approximately?

A. I wouldn't—I couldn't tell you.

Q. Then what was done?

A. Well, then I went on the other side of the desk, and he put another pillow there, and I laid the right side of my head on it, and he went through the same procedure he did with the right ear.

Q. Did you feel anything at that time?

A. The only thing, when he put it in the left ear, I felt it was warm here (indicating). It was a little different from in the right ear.

(Testimony of Frederick Hartley)

Q. You are pointing just below your ear?

A. I felt it down here (indicating).

Q. Just underneath your ear? A. Yes.

Q. Do you know what, if anything, he was placing in your ear? A. No, sir.

Q. All you know is that it felt warm; is that correct?

A. Yes, sir, it felt warm.

Q. Did you say anything to Mr. Owen at that time about it feeling hot? A. No.

Q. What next occurred? [11]

A. Well, then we waited a minute or so, and in the interim the telephone rang, or something, and he was going out while he was working on me, and he came back, and I said, "You are quite a busy man." He says, "Yes." He made a remark that he was awfully busy.

Q. Did he leave you more than once?

A. About twice. At least twice.

Q. How long was he gone on each occasion?

A. About a minute or two.

Q. All right. What next occurred?

A. Well, then like I said, he came back and poured this stuff in my ear, and it felt a little warm, and that's all. I didn't know whether it was all right or not. I didn't make any comments or anything, and then he must have took them out and laid them out, and, as I say, I can't recollect.

Q. Did he do anything with respect to your ear after this warm sensation?

A. He just waited a while, and I could feel him pulling something out.

(Testimony of Frederick Hartley)

Q. Had you felt something on the right side, when he worked on your right ear?

A. Well, practically the same thing, yes.

Q. Do you know what he pulled out of your left ear?

A. No. I assumed it was a mold or an impression.

Q. Well, immediately following his pulling this out [12] did you observe what he had?

A. No, I just—he put it down on the table and said, "Well, there they are."

Q. And what did you observe on the table?

A. I didn't take much notice. I just seen like a bunch of clay, or something; a cast.

Q. What color was it?

A. Well, it appeared white. I don't know. I couldn't—

Q. You say it looked like clay?

A. Clay, or—

Q. Did you touch it? A. Oh, no.

Q. Did he tell you what they were?

A. He said they are impressions. He said, "We will send these away to the laboratory, and in about four or five days you will get your earpiece."

Q. How many of them were there? A. Two.

Q. All right. Then what occurred?

A. Well, then he said that was all, so—

Q. May I ask you this: Was your wife present at any time during this process?

A. Well, I asked him how much it was going to be. So the hearing aid was $50.00, and the extra piece for the air conduction was $3.00 or $3.50, and taking an impression of my [13] right ear was $6.00, so that it come to $59.00 or $60.00. So we didn't have our check book or any way to pay him. So we asked him how could we

(Testimony of Frederick Hartley)

pay them. He said, "If you have a checking account, you can go up to the office and they will give you one of the checks, and you can make it out." So my wife went up and made out a check for $60.00.

Q. And was she gone while the impressions were being made? A. Yes.

Q. This earpiece that cost you $3.50, what was that?

A. Well, you see, they sell you an earphone for $50.00, with either one, a bone conduction or a thing to put in your ear for air conduction. So I took the $50.00 one with the bone conduction, and then paid him the extra $3.50 to get the both of them.

Q. But what is this earpiece you refer to?

A. It is just a little piece of plastic with a rubber on it that anybody can use or stick it in their ear. It is just a conventional piece.

Q. Do you have one at this time?

A. Oh, no. I got one home. I never used it.

Q. All right. Now, when you were through did your wife return?

A. Well, while she was gone and made the check out, I decided on having the other one made and we paid him cash [14] for the other one. When she returned we were practically through with the fitting.

Q. Had the store closed as yet?

A. Oh, no. He says, while he was making out the bills and we were paying him, he says, "We haven't got much time. If we don't hurry up, all the lights will go out in the place," and he says, "then we won't be able to see what we are doing."

(Testimony of Frederick Hartley)

Q. Now, at that time did you have the sensation that you experienced in your left ear continue, that of being warm?

A. Well, on the way out I remarked to my wife, I says, "This side feels funny, just like as if I was out swimming and it feels like I got water in my ear." And I kept tapping my head to see if I could clear it up.

Q. Are you pointing to the same place below your left ear that you did when you described the warm sensation?

A. No. It was in there, and it felt like it was all blocked up.

Q. I say, You are pointing to the left side, are you?

A. Yes.

Q. Did you tell Mr. Owen at that time about the sensation?

A. Oh, no. It was after I left him that I kind of felt that. I didn't have much time to tell him. We had to get out of there.

Q. While you were observing these two clay-like molds [15] on the table did you notice whether anything was attached to them or not? A. I couldn't say.

Q. To the best of your recollection?

A. Well, no. I just noticed them there, and like I said, I didn't take particular notice.

Q. Now, had you had any molds made for your ears prior to October 13, 1945? A. No, sir.

Q. I believe you said you had not had an air conduction hearing aid prior to that time?

A. No, sir.

(Testimony of Frederick Hartley)

Q. Prior to October 13, 1945, had you been able to hear without your hearing aid at all?

A. Oh, I took it off occasionally, when it was—when I didn't have company, or nobody was around, because the pressure, it kind of makes your head sore. So I used to take it off a lot when I would be alone, or with my wife at home, or something.

Q. What, if anything, did you hear without your aid?

A. Well, I couldn't hear everything, but I could—my wife could make me hear her by shouting and talking loud to me.

Q. Do you know how close to you she would have to be in order to make you hear, that is, prior to October 13th? [16]

A. She could be in the same room with me or just step into the next room and talk in a loud voice, and I would hear.

Q. Now, you have indicated that you told Mr. Owen that in your right ear your hearing was not as good as in the left. Upon what did you base that statement?

A. Well, from the first time I noticed I was getting hard of hearing. I went to bed one night and set the alarm clock, and in the morning I didn't hear it go off, and I didn't hear the clock, and I was laying on my right ear, and I jumped up to shake the clock, and when I jumped up I heard it. I did that a couple of times, and then I remarked to my wife, "Gee, I am losing my hearing; my hearing in my right ear."

(Testimony of Frederick Hartley)

Q. Now, what occurred after you left Sears, Roebuck & Company store on October 13, 1945?

A. Well, on the way home we went to a moving picture show.

Q. What, if anything, did you notice with respect to your ear?

A. Well, I tried—I had the new hearing aid in the box, and I was trying to see how I would hear by putting the plug in that comes with the hearing aid in my ears. And if I put it in my right ear, I could hear a little, but not too good, and when I put it in my left ear, I didn't hear thing. And I told my wife, "Gee, these things are no good. I can't [17] hear anything." So I used my old one then, the one I had before.

Q. When you left the store, you indicated you felt a sensation on your left side as if you had been in swimming. Did that condition continue?

A. Well, I went to the show, and it felt like—just the same way like I told you, and it felt that way that night, and I went home and went to bed. Then when I got up the next morning—

Q. What time did you get up the next morning?

A. What time?

Q. Yes.

A. Oh, about 9:00 o'clock; Sunday morning.

Q. Had you felt anything during the night?

A. No, I slept alright.

Q. All right. Proceed.

A. And I got up, and there was a funny feeling, like I was enclosed, you know, like in a stuffy room. I didn't feel like I always felt.

(Testimony of Frederick Hartley)

Q. Where was that stuffy feeling?

A. Well, in my head.

Q. On which side?

A. Well, it just felt like I wanted to get out or get away from something. So I asked my wife to look in my ear.

Q. You keep touching your left ear. Do you mean by [18] indicating that that you felt it on your left side?

A. Well, yes.

Q. And did your wife look into your left ear?

A. Yes, sir. I laid my head on the table, and she looked in it while we were eating breakfast.

Q. Do you know what she found, if anything?

A. She said it was all stopped up.

Mr. Wheeler: If your Honor please, I submit that this is hearsay, this conversation as to what his wife told him she found upon examination of the ear.

The Court: Yes, I think so. That would not be a part of the res gestae.

That was the day following, was it not?

The Witness: Pardon me?

The Court: That was the next day, wasn't it?

The Witness: That was the next morning.

The Court: Was that Sunday morning?

The Witness: Sunday morning.

The Court: Objection sustained.

Q. By Mr. Moore: What, if anything, did your wife do with respect to your left ear?

A. Well, I asked her if she could see anything.

(Testimony of Frederick Hartley)

Q. The judge has ruled that the conversation between you is not admissible. Did your wife do anything with respect to your left ear? [19]

A. Well, she got a bobbie pin and went inside to touch it and said it was all hard in there.

Q. Did you hear anything yourself when she went in with the bobbie pin?

A. Yes, it felt like a stone wall.

Q. Then what, if anything, did you do?

A. Well, she wanted me to go to a doctor, to try to get it out.

Q. Did you go to a doctor that day?

A. I didn't know of any doctor, didn't know where to go.

Q. Did you go to the doctor that day?

A. No.

Q. All right. Was your ear bothering you at all?

A. Oh, yes.

Q. What sensation, if any, did you have?

A. Well, it wasn't a bad pain, but it was something that I felt, like I wanted to get out of there.

Q. All right. Did you go to a doctor at all?

A. The next day.

Q. On Monday? A. On Monday.

Q. October 15th? A. That's right.

Q. Prior to the time you went to the doctor, did you continue to feel the sensation you refer to? [20]

A. Oh, yes. My boss called me up, and I had to go up to my place of employment on Sunday to work on a job, get a job going, and I told him, I says—

(Testimony of Frederick Hartley)

Q. My question was: Did you continue to feel the sensation as if something was bothering you?

A. Oh, yes, it was bothering me.

Q. And then you went to a doctor on Monday?

A. Yes, sir.

Q. To whom did you go?

A. To Dr. Ghrist in Glendale.

Q. At what time of day did you go to him?

A. I had an appointment at 2:30 in the afternoon.

Q. How was your ear feeling at that time?

A. Well, it was getting—feeling like it had something in there and I wanted it to come out.

Q. Did you see Dr. Ghrist? A. Yes, sir.

Q. What, if anything, did he do for you?

A. Well, I waited for a while, and then he called me in his office, and he asked me what happened, and he looked in my ear, and he said, "Mercy."

Q. Did you tell him what had ocurred?

A. Yes.

Q. And after looking in your ear what else did he do, if anything? [21]

Q. Well, he says ever since he left medical school he never had any use for some tools that he brought out to get this stuff out. He said he never thought he would ever get to use them, but he said now they would be coming in handy.

Q. What, if anything, did he do?

A. He tried for about a half an hour to get it out and couldn't get it out.

Q. Did you observe what he was doing?

A. What?

(Testimony of Frederick Hartley)

Q. Did you observe what he was doing?

A. No. There was a couple of nurses holding my head. I had my head down on the side, and they were holding it.

Q. Did you feel anything in your ear?

A. My left ear.

Q. What did you feel?

A. Well, he was digging in there, trying to get this obstruction loose. Then he told me to go sit down and wait, and let me wait around there.

Q. What, if anything, else occurred?

A. Then in about a half an hour he poured some stuff in, and about a half an hour later he started working on me again. He had a few other patients in, and then he started working on me again, and in all that time he kept working and kept digging, and I broke down, I couldn't stand the pain any more [22]

Q. Well, what occurred?

A. He said I have to go to the hospital.

(Witness weeping.)

Q. Well, did you go to the hospital that day?

A. No, the next morning at 7:00 o'clock.

Q. All right. Did your ear bother you during the night?

A. Well, sure. He made it hurt.

Q. So then the next day you went to the hospital, and what, if anything, was done? Where did you go? Which hospital?

A. Physicians and Surgeons Hospital in Glendale.

Q. What, if anything, was done there, and by whom?

A. Well, I went there and I went to the desk and told them I was sent by Dr. Ghrist, and they put me to bed.

(Testimony of Frederick Hartley)

The Court: I think it is about time for our recess. Mr. Moore, we will take our morning recess.

Ladies and gentlemen, we will take a recess for a few minutes, five or ten minutes; not to exceed that, Mr. Bailiff.

During the recess, and whenever you separate from one another, in the jury box and during the trial of this case, do not talk about the case or suffer yourselves to be spoken to or approached by any person concerning the case or anything involved in the trial of the case, and do not form or express any opinions on the case until it is finally submitted to you. Please occupy the jury room, ladies and gentlemen, during the [23] recess.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Moore: Miss Reporter, will you please read the last question and answer?

(The record was read.)

Q. By Mr. Moore: What happened then, Mr. Hartley?

A. They gave me something to take, with a needle, and put me on an operating table; a wheel-chair, you know, a thing they lay you down on and wheel you out.

Q. Then what occurred?

A. I don't know. I went out.

Q. When you came to, where were you?

A. Well, I was at the same place. I thought I was going to get up and go home, and I got up and thought it was dinner-time and it was the next morning. I didn't remember anything until the next morning, you know, everything was—well, I got up and fell down, and went

(Testimony of Frederick Hartley)

back to bed, and they told me I had been asleep all the time, the other patients.

Q. This was on Tuesday, the 16th, you went to the hospital? A. Yes.

Q. And when you refer to the next morning, that is Wednesday, the 17? A. The 17th. [24]

Q. When did you leave the hospital?

A. The same day, at noon-time.

Q. On the 17th?

A. I went to the hospital on a Tuesday, and I left the next day around noon-time, on a Wednesday. I had to wait for the doctor to come and discharge me.

Q. How did you get home?

A. I drove my car. I went to the hospital myself and went home myself.

Q. Now, how did your ear feel when you left the hospital?

A. Well, when I got up in the morning in the hospital the pillow was all blood, and it was just, you know, like a dull ache.

Q. Now, how long did you continue to have trouble with your ear?

A. Well, I had to keep going to the doctor. So about two or three days after the operation I went back to the doctor.

Q. When you say "the doctor" you mean Dr. Ghrist?

A. Dr. Ghrist, yes. And he says, "How do you feel?" I says, "I am dizzy. I feel like everything is going around."

Q. Did you feel dizzy when you left the hospital?

A. No. Well, I didn't feel good.

(Testimony of Frederick Hartley)

Q. When did this dizziness first come on?

A. Well, I can't remember. You know, I was all upset.

Q. But at the time you went to the doctor two or three [25] days later you were feeling dizzy, were you?

A. Yes.

Q. What other sensations, if any, did you have?

A. Well, the ear was paining. Naturally, it ached, but I could stand it.

Q. Were you taking anything?

A. No, only when I went back he looked in and he says, "You have got an infection now."

Q. That is when you went back the first time?

A. Yes.

Q. What, if anything, did the doctor do at that time?

A. He just looked in there and gave me a prescription for sulfa drugs, and told me to take them.

Q. Did you purchase the sulfa drugs?

A. Yes.

Q. And did you take them? A. Yes.

Q. All right. When did you see the doctor again?

A. Well, he kept—you know, he told me like—I don't remember the days, but he said about three or four days later I had to go back again.

Q. Did you go back? A. Oh, yes.

Q. What, if anything, did he do for you at that time?

A. Just looked in there. [26]

Q. How did you feel between the time of your first visit to him and your second visit to him, after you came home from the hospital ?

A. Well, it started—my ear stopped running, and it felt closed up again.

(Testimony of Frederick Hartley)

Q. Did that condition of running stop for a while, and then start again?

A. It stopped, yes. Then he looked at it and he says, "It is coming along pretty good."

Q. How many more times did you go to Dr. Ghrist?

A. I kept going, I can't remember, about four or five times I kept going to him.

Q. Over what period of time? Over how long a period of time?

A. About two to three weeks.

Q. During that time how did you feel?

A. Well, about five or six days after the operation my ear started to bother me again, and so—

Q. When you say "bother me," what do you mean?

A. Well, my head started to fill up and my ear started hurting again, and the doctor—I could not get the doctor. He was gone away, or something, and I didn't have an appointment until about Monday, and so I didn't know what to do, see, and so I went and took some more sulfa drugs because I thought the infection was coming again. I could not get the doctor, [27] and so that would be like on a Thursday that I couldn't get the doctor, and so on that Saturday night something seemed to bust in my ear, like it opened up, and then it started to run again all over the pillow, and then I felt all right.

Q. Then that seemed to relieve the situation?

A. That relieved it.

Q. How long did it continue to run on that occasion?

A. Did it run?

Q. Yes.

A. Well, I went to bed, and when the stuff was coming out I felt better.

(Testimony of Frederick Hartley)

Q. How long did that running occur?

A. Just about one night and part of the next day.

Q. Did you see the doctor after that?

A. Yes. I felt good then.

Q. About how long was that after leaving the hospital?

A. Well, that might have been Monday right after that Saturday night; then Sunday, and I think it was about Monday or Tuesday. I don't remember.

Q. About how many days or weeks after you left the hospital was the occasion of the breaking in your ear?

A. Oh, that happened about—oh, about seven or eight days after the operation.

Q. Then did you see the doctor any further after that?

A. Oh, yes, about three or four more times. [28]

Q. What, if anything, did he do to you each time you went there?

A. Never done anything; just looked at it.

Q. Did he give you any other medicine, other than the sulfa?

A. No. He told me not to take any more sulfa drugs.

Q. Do you recall of your going to him any further now?

A. No. He told me not to come back, but I never went back to him because—

Q. Do you recall approximately the date of your last visit to him?

A. No, I don't remember. I didn't mark it down.

(Testimony of Frederick Hartley)

Q. Now, do you know how much you spent for your medicine?

A. Well, the first time my wife bought them, and I think it was about $1.00 for the pills, and then I bought another dollar's worth after that.

Q. $2.00 for your medicine? A. Yes.

Q. Did you have an anesthetist in the hospital? Do you know whether you had a person, a doctor or a person who gave you an anesthetic?

A. Yes. I got a bill for $20.00 for some lady doctor that gave me an anesthetic.

Q. And did you pay that? [29] A. Yes.

Q. And did you receive a bill from Dr. Ghrist?

A. Yes.

Q. What was the amount of that bill?

A. $45.00.

Q. Have you paid that? A. Yes.

Q. Did you have a hospital bill at the Physicians and Surgeons Hospital?

A. I had to pay before I went in.

Q. What was the total amount of that, if you knew?

A. I think I paid $20.00 going in, and a couple of dollars coming out.

Mr. Moore: Excuse me, your Honor.

(Thereupon, certain documents were handed to opposing counsel.)

Mr. Wheeler: I will stipulate to that, counsel.

Mr. Moore: The two receipts, your Honor, total $24.06.

The Court: That is the hospital bill, is it?

(Testimony of Frederick Hartley)

Mr. Moore: That is the hospital bill, yes. I am going to have the doctor here this afternoon, who can verify the doctor's and the anesthetist's bill.

Q. By Mr. Moore: After the last time that you saw Dr. Ghrist, did you have any further trouble with your ear, your left ear? [30]

A. After the last time?

Q. Yes.

A. Well, just an annoying feeling, but I figured it would get better by itself.

Q. What do you mean by that type of feeling?

A. Well, when I was all through and I got the stuff out, and he told me I was all right, he told me, "You are all better now," and he says, "You can come back in a couple of weeks and let me look at it." So then all I have is a little, you know,—I have a feeling over here (indicating) all the time.

Q. You are indicating by running your hand over your hair?

A. Like a fly, or something, was bothering me all the time.

Q. When did that sensation start?

A. It started right after.

Q. You mean right after the incident you have referred to on October 13th?

A. After that, sure.

Q. And how long did it last?

A. Up until about five or six weeks ago. It didn't bother me. Just that annoyed me is all; no pain.

Q. Was that over your left ear?

A. Yes, right here (indicating). [31]

(Testimony of Frederick Hartley)

The Court: He puts his hand over the parietal region of the head. Is that correct, Mr. Wheeler?

Mr. Wheeler: Yes, your Honor.

Q. By Mr. Moore: Have you felt anything else since the last time you went to the doctor?

A. No, sir.

Mr. Moore: That is all.

Cross-Examination.

By Mr. Wheeler:

Q. Mr. Hartley, you stated that you are a tool and diemaker, are you? A. Yes, sir.

Q. What type of dies,—what type of work does that involve? A. What type of work does it call for?

Q. Yes.

A. Well, anything that is fabricated has got to have tools made in order to fabricate it, if it is out of metal or any kind of plastics, or anything.

Q. And what is your particular specialty?

A. I can't hear you. You will have to talk louder.

Q. What is your particular specialty?

A. Diemaker; tool and diemaker.

Q. Well, do you make any particular type of dies, or all types of dies? [32]

A. All types of dies. Right now I am making plastic dies, for plastics.

Q. During your experience you have made dies out of metal, have you? A. Metal.

Q. And dies out of plastics?

A. No, I make dies to make plastics.

Q. Then all of the dies you make are made out of metal? A. Steel.

(Testimony of Frederick Hartley)

Q. Steel. And what particular type of dies are you making or for what kind of products at the present time?

A. At the present time?

Q. Yes. A. For thermostatic plastics.

Q. And what type of a die would you make?

A. What type would I make?

Q. Yes. What would you make for that instrument?

A. Well, I could make anything that is put before me, or if you want to make any kind of an article, I make a die to make that article.

Q. A die is similar to a mold, is it not?

A. No.

Q. What is the difference?

A. Well, a die, they use that for production.

Q. Yes. [33]

A. And in order to make a die for a mold, it is like anything else, you have got to make a finished article backwards, in other words.

Q. Yes.

A. And there has got to be ejections, and there has got to be feers, and it is quite a study. And there is all kinds of things come up that you have to know, so as to make them out of steel.

Q. What do you make the die from?

A. What do me make it from?

Q. Yes. Suppose you have a product you want to make and you want to make a die for it, how do you go about it?

A. Well, you got—you just make a mold. You make your die, and you figure it out, you lay it out, and figure whether it can be molded or not, and you rework the product in order to make your mold and make your die.

(Testimony of Frederick Hartley)

Q. First you make a mold then, do you?

A. No.

Q. What do you do to make your die?

A. What do I do to make the die?

Q. Yes.

A. First, you have got to get your steel, and you have got to machine all your steel up. Then you have to make your cavity, then you have to make cores, and you have to see that the die works together, that it is all automatic, [34] that it closes and it opens, it ejects, that it takes the pieces and is ready for the mold all in one operation.

Q. Well, do I understand you then that you do not make a mold from which you make the die?

A. No, sir.

Q. How long have you been doing this type of work?

A. Well, that is my trade. All my life since I was 16 years old, and I am 47 years old now.

Q. You are presently employed where?

A. At the Muntz-Sparks Company. That is the Muntz-Sparks Tool and Die Company at Pasadena.

Q. And it is at that plant that you make the dies for plastic material?

A. I make the dies in the machine shop and they go to another factory, where they take the dies and they eject plastics from the dies so that it makes a thermostatic plastic.

Q. You are interested in that line of work, are you not? A. Yes, sir.

Q. And interested in the problems that arise in the making of dies? A. That's right.

Q. What is your job rating, or what is your position?

A. My position at the present time?

(Testimony of Frederick Hartley)

Q. Yes.

A. I am foreman. I am the foreman of the die shop. [35]

Q. And does that involve supervision of work of other men?

A. That's right; supervising the work, laying it out, and seeing the men do the work right.

Q. Now, prior to your employment at this place in Pasadena, where were you employed?

A. I was employed—just before that I was in business for myself, making dies; hiring machinery and making dies for the same people I am making them for now.

Q. So you have been in this business,—I mean on your own and in the capacity of—

A. Of having people, and before that I worked for Wilcox Plastic Company.

Q. Where is that?

A. That is in East Los Angeles on Goodrich Boulevard.

Q. And you were a tool and diemaker there?

A. That's right.

Q. Were you a foreman in that place?

A. No, I wasn't a foreman; just a tool and diemaker.

Q. Now, you stated, I think, that the first time that you noticed that you were losing your hearing was sometime when you had an alarm clock and you wound the alarm clock and couldn't hear it run?

A. That's right.

Q. When was that incident? [36]

A. When?

Q. Yes. A. Approximately?

(Testimony of Frederick Hartley)

Q. Yes.

A. Oh, around 1934, '35, or '36, somewhere around there.

Q. And did you notice after that that it became increasingly difficult for you to hear?

A. Oh, sure. Not too bad. I kept getting hard of hearing.

Q. In other words, it became more difficult for you to hear as time went on?

A. Yes, people kept asking me, "Don't you hear me?" And I didn't hear them.

Q. You found that you weren't hearing what people said to you?

A. Only what they told me, that they talked to me. I only hear what I heard. You know, if people talked to me, I heard them, and if I didn't hear them, I couldn't. I wouldn't know whether I heard them or not. I don't know.

Q. Did you at any time notice whether there were any particular types of people that you couldn't hear?

A. I wouldn't know. Just people kept shouting at me and telling me I was—

Q. And when they shouted at you, did you hear them? [37]

A. Why, sure, if they talked loud.

Q. Where did they have to stand?

A. When was this? Where did they have to stand when?

Q. When they shouted at you so you could hear them.

A. Well, I wouldn't know they was shouting. They would just tell me they were talking loud.

(Testimony of Frederick Hartley)

Q. I see. Now, when did you first start to wear a hearing aid?

A. Well, I went to the Veterans Hospital in 1938 and they told me that it was nerve deafness, or something, and it was just the right ear. I went to get a repair on my side, and then I kept, you know, having difficulty hearing people, and, you know, people passing remarks, so I bought a hearing aid. That was around 1939 or '40.

Q. And what type of hearing aid did you buy?

A. A Western Electric carbon set.

Q. Did you have any difficulty in hearing after you used that hearing aid?

A. I didn't use it much.

Q. When did you use it?

A. Well, whenever I wanted to hear, make sure I wouldn't miss anything, like if I go to a meeting or if I thought I would need it; you know, like if I would go to a hall or there would be a meeting, or a show, or I really wanted to hear good, I would wear that. [38]

Q. Did you wear it at work? A. No.

Q. Did you wear it at home?

A. Well, only when my wife would tell me to put it on and say, "Why did you buy it for, if you don't wear it?"

Q. When did you get the next hearing aid?

A. Well, I came out to California in 1941. I had that hearing aid. Then I was called back East to take over a factory back there, supervise a factory. Well, I went back there and got a pretty good job as superintendent of a factory. So then I had to meet people and talk to people, so I decided to buy another hearing aid, because they were coming out with a vacuum tube hearing

(Testimony of Frederick Hartley)

aid at that time. So I thought I would try that, so I bought an Acousticon.

Q. And did you use that hearing aid all the time?

A. From that time I started to wear it most of the time, yes.

Q. And since 1941 you used the hearing aid?

A. Occasionally.

Q. All of the time?

A. No, since 1942, after I bought the Acousticon, I used it practically continuously. I didn't like the other one. It was too noisy. It bothered me.

Q. It was the type of hearing aid that caused you not to use the first one as frequently as you required? [39]

A. Well, yes. It was noisy, made a lot of noise, and you would only hear it when you were standing up and wouldn't work—it was a carbon set and you had to be in a certain position.

Q. Now, this Acousticon was a bone conduction?

A. That's right.

Q. What is the principle involved in the bone conduction type of hearing aid?

A. Well, with a bone conduction you can—well, the way the doctors tell me—

Q. Well, do you know yourself?

A. Yes. You have three ears, you have an outer ear, an inner ear and a middle ear, and if you have a good bone conduction, you will never be deaf, and I have a good bone conduction. Doctors tell me I can hear better with bone conduction than a normal person can, that I am above normal. That is, by putting it on my forehead, either side, or my teeth, either side, I can hear anything, I can hear a pin drop. That is with bone conduction. And

(Testimony of Frederick Hartley)

with bone conduction you just put it on the mastoid bone, and it is like a telephone, and it jumps the outer ear and middle ear to the inner ear that makes you hear, and in between the two ears—you know, the doctors tell me and you read pamphlets all about the mechanism of the ear, the anvil and all that stuff, and that is what makes a person hear. So I can hear good through [40] bone conduction, and if I put my head here on the wood, and I brace it, I can hear that way.

Q. Have you ever had any examination before for air conduction? A. Did I ever have any?

Q. Yes. A. Yes, sir.

Q. Where did you have those examinations?

A. Well, in different places I went when I bought the Western Electric and I bought the Acousticon. The Acousticon people, they always gave me an examination, an audiograph, to see how bad I was.

Q. For air conduction?

A. To find out how hard of hearing I was. When you are hard of hearing they give you an audiograph to test your hearing, to see what degree the loss of hearing is, and they tell you. And when they put the bone conduction on, they always told me I had marvelous bone conduction. So they always sold me one of those things that come around here (indicating). So I was wearing them, and I went to buy batteries at the Acousticon Institute, that is one of their offices, and there was a so-called expert there, and he says, "Well," he says, "can you hear with an air conduction?" I says, "Well, I don't know. I never tried it, you know."

He says, "Well," he says, "the theory is," that was his [41] theory he said, "you know you could save your

(Testimony of Frederick Hartley)

hearing from getting any worse by using an air conduction." He said that revives a nerve, or something.

Q. That was just some conversation you had?

A. That was in the conversation. That is mostly the reason I thought I would try this and get that pressure off my bone all the time.

Q. The air conduction is more convenient and has less pressure on your head?

A. Yes. I can't hear as good with air conduction as I can with bone conduction.

Q. Had you ever tried a Zenith machine before?

A. Only one time. When I went to buy batteries in Pasadena, when they were hard to get and they had them in an optical place there, they just showed them to me, and I put it on, and I just seen it there, that's all.

Q. Now, when you tried the Zenith on the night of October 13th, can you describe the earpiece that was used?

A. Could I describe the earpiece that was demonstrated to me?

Q. Yes.

A. Well, when you buy a hearing aid they always tell you that you have to have a molded earpiece, if you have an air conduction, but Zenith advertises that you don't have to buy anything, that they have a plug, a conventional plug that will [42] fit anybody's ear with some kind of a rubber adapter that will fit on your ear, and fit anybody's ear. So that is the reason I paid the $3.50 extra, in case I wanted to try the air, that I could stick that thing in and see if I could hear. So then I was sold on the idea that night to have an ear mold made at the same time, which would run $6.00 and that they

(Testimony of Frederick Hartley)

did it right there and I didn't have to go to a doctor or dentist, or anything. That is the reason I got it.

Q. Now, do you have these earpieces that were made for you at that time? A. Do I have any?

Q. Yes.

A. I am wearing one and I got one in my pocket.

Q. You have the one in your pocket for your left ear?

A. The left ear, it is broke off. It broke off short. That's the same as the plastic thing they took out; the impression is the same as that. That is the way I got it.

Q. Well, this is the earpiece that was sent to you by Sears, Roebuck & Co.?

A. To wear with the hearing aid, to make me hear better.

Q. Where is it broken?

A. Right here (indicating) it is not complete. That is where it ended. That is where it broke when he was taking it out. It shows up on the cast too.

Mr. Wheeler: If your Honor please, for the purpose of the [43] trial, subject to the right of withdrawal, I think that it is important to have this as a part of the exhibits. I therefore offer it in evidence as Defendant's Exhibit 1.

Mr. Moore: I have no objection, your Honor, provided we also have the plaster molds, which I understand were delivered to your Honor.

The Court: Yes. The court has them, I think.

The Clerk: Yes, your Honor.

The Court: It will be marked as an exhibit. Just where is the break?

(Testimony of Frederick Hartley)

The Witness: Your Honor, do you mind if I take this one out?

The Court: No.

The Witness: Then I can't hear.

(Witness removes earpiece from ear.)

The Witness: You see, this here (indicating) goes right inside my ear, you know, way in, and this one here, it stops. It stops about here (indicating), and if you put them down, you can see the height. See?

The Court: Can you hear me now?

The Witness: Yes, sir.

The Court: I understand you to say that this was broken, this set?

The Witness: If you compare them, you will see.

The Court: Wait a moment, please. Will you mark that? [44]

The Clerk: Defendant's Exhibit A.

(The article referred to was marked Defendant's Exhibit A, and was received in evidence.)

The Court: You said that Defendant's Exhibit A was broken?

The Witness: No, it is cut off short. That is the one that was broken off.

The Court: I see what you mean.

The Witness: This one has not broken off.

The Court: Not that it was broken, but that it was made short.

The Witness: By looking at it, from my ability as a mechanic, after getting them both, because I am a mechanic I saw that. So if you put that there, you will

(Testimony of Frederick Hartley)

see this is about an eighth of an inch higher than this one (indicating). So that if you actually put anything in a hole like this, and it is not hooked under here—your Honor, look, you can pull it out. But if it is hooked, you can't. So when it was pulled out, it had to go some place.

The Court: I think I understand.

The Witness: You understand, it had to go some place. You couldn't pull that, but you could pull this.

The Court: Proceed, Mr. Wheeler.

Mr. Wheeler: May the plaster molds be marked as exhibits also, your Honor, and be introduced as Defendant's Exhibits [45] B and C?

Mr. Moore: No objection, your Honor.

The Court: So ordered.

(The articles referred to were marked as Defendant's Exhibits B and C, and were received in evidence.)

The Court: I will state that Exhibits B and C are the instrumentalities that were delivered to the judge on yesterday in compliance with the pre-trial order, and were this morning delivered by the judge to the clerk.

Mr. Moore: Counsel, may it be stipulated that these are ear molds that were turned over to you by counsel for the plaintiff, and I believe they have been identified by the laboratory and by yourself as being the molds that were made for Mr. Hartley.

Mr. Wheeler: That is correct. I will stipulate that these are the molds that were made for Mr. Hartley, with the reservation—I mean, subject to the explanation that they are not at the present time in the exact con-

(Testimony of Frederick Hartley)

dition as at the time when they were taken out of Mr. Hartley's ears.

Mr. Moore: That is true. As I understand it, there were certain markings put on by the laboratory, and coloring, that were not originally on there.

Mr. Wheeler: That is correct.

Mr. Moore: And that one of them was broken in mailing and was put together by the laboratory. [46]

Mr. Wheeler: That is correct.

The Court: So understood. These exhibits may be shown to the jury later on.

Mr. Moore: Yes. I wonder, counsel, if we can identify either Exhibit B or Exhibit C as being the counterpart of Exhibit A?

Mr. Wheeler: If the witness can do so, we can do it right now. If he can't, I will do it later.

Mr. Moore: All right.

Q. By Mr. Wheeler: Showing you defendant's Exhibit C, Mr. Hartley, I will ask you to compare that with the ear mold or ear piece, rather, which is Defendant's Exhibit A, and ask you if the ear mold is the same as the earpiece?

A. Is this the same as that (indicating)?

Q. Yes.

A. Well, they are both different materials.

Q. Yes, but I mean as to the shape and form, does one appear to be the same in shape and form as the other?

A. That's right. If you will prepare this, you will get this from that (indicating).

(Testimony of Frederick Hartley)

Q. Upon examination of Defendant's Exhibit B, I will ask you if that appears to be identical with Defendant's Exhibit A.

A. Of course not. It is obvious that this here is complete. [47]

The Court: Mr. Hartley, pardon me just a moment. Will you refer to these exhibits by the letter rather than by "this" and "that" for the record? If any one wants to read this later on, it will not be clear at all and they will not be able to know what you are saying.

The Witness: A. Well, these two pieces are opposite. These are the same.

The Court: You are now referring to one that has become detached. I presume that is Exhibit A that you are referring to?

The Witness: Yes.

The Court: That is Exhibit A. And this is Exhibit B, as you will see by the letter, and this is Exhibit C. Now, make the comparison which you made when you said "this" and "that."

The Witness: Well, Exhibit A is the same form as Exhibit C.

Q. By Mr. Wheeler: And it is not the same form as Exhibit B? This is Exhibit B?

A. No, it is not the same form.

Q. In other words, Mr. Hartley, then Defendant's Exhibit C is the mold from your left ear?

A. That's right.

Q. And Exhibit B is the mold from your right ear?

A. Right ear. [48]

Q. And A is the earpiece for your left ear?

A. A is the earpiece for the left ear.

(Testimony of Frederick Hartley)

Q. Now, so I can clearly understand it, this mold, or, I mean the earpiece that you have is not broken, or, I mean it is in the same condition as you received it?

A. Yes. I hadn't touched them.

Q. The earpiece I am referring to now.

A. The one I have got in my ear now?

Q. Yes.

A. That is the same as I got it when they mailed it.

Q. And the earpiece for your left ear, which is Defendant's Exhibit A, is in the same condition as when you received it? A. That's right.

Q. This statement of yours with reference to its being broken is a conclusion of yours which you drew from an examination?

A. From an examination of the two pieces, yes, sir.

Mr. Wheeler: If your Honor please, I move that the testimony as to Defendant's Exhibit A being broken be stricken on the ground that it is a conclusion of the witness, and, therefore, should be disregarded.

The Court: I think it should not be disregarded, but the jury heard the examination of the witness by the court on that point, and they will have a right to inspect these two objects [49] so as to determine whether or not the nomenclature, the description, or the use of the word "broken" was the proper appellation.

Mr. Moore: Your Honor, may I be excused for just one minute? I have some papers which were brought up to me.

The Court: Yes.

Mr. Moore: Thank you.

The Court: With that statement, the motion is otherwise denied.

(Testimony of Frederick Hartley)

Q. By Mr. Wheeler: With reference to the purchase of these earpieces on October 13th, Mr. Hartley, had you ever been in that department prior to this evening? A. No, sir.

Q. You had never met Mr. Owen before?

A. No, sir.

Q. Now, you stated that you went to the department at about 8:00 to 8:15 of that evening?

A. Did I what?

Q. On that occasion you went to the department where these hearing aids were sold at about 8:00 to 8:15 in the evening, did you not?

A. Between 8:00 and 8:15 in the evening?

Q. Yes. A. As near as I can recall, yes.

Q. How long did it take to make the first impression on [50] your right ear? A. How long?

Q. Yes. A. Approximately how long?

Q. Yes.

A. Well, as long as I would take to tell you. I put my head on a pillow, and he had a mixing bowl, and he mixed something, and he put something in my ear, and fooled around, and then I felt some pouring in, and then he let it harden, just like as if you were getting a mud pack on your face, like the barber gives you, and then he took it out and he set it there. Well, in my opinion, that would take about 10 to 12 minutes.

Q. Yes. Then it was immediately after he took the first impression that he made the second impression—

A. Yes.

Q. —was it not? A. Yes.

(Testimony of Frederick Hartley)

Q. Now, did you do anything in the store after the impression was made, after the two impressions were made? A. Did I do anything in the store?

Q. Yes.

A. Walked out, and stopped at the desk where we had the check made out.

Q. Did you make any other purchases? [51]

A. No, sir, the store was closing.

Q. How long did you stay at the check desk?

A. About—on the way out, it was on the way out, and just talked to the man and asked—we forgot—we didn't have our check book, and the bank had a name similar to another bank, and I wasn't sure what name it was, and we looked it up in the book, if it was the right name, and it was, and we made it out—my wife made it out.

Q. Who made out the check at the check desk?

A. My wife.

Q. Were you present?

A. Not when it was made out. Only when we went out, she said, "That is the check desk."

Q. You didn't stop there then, did you?

A. Oh, yes. I stopped to look in the book they had there, and I was interested. They had the names of banks all over the world, and in this country, and I looked in the book to see if the bank was listed in my home town back in Connecticut, and I looked through, and it was there.

Q. How long did you spend there?

A. Oh, about three or four minutes.

(Testimony of Frederick Hartley)

Q. And were the lights on—

A. Yes, the lights were on.

Q. —when you left? A. Yes. [52]

Q. Do you know about what time you left?

A. About 9:00 o'clock.

Q. And you went out from there up to the parking lot?

A. To the parking lot, and got my car.

Q. Which parking lot were you parked in?

A. Well, on the side street. There is only one parking lot.

Q. In the Pico parking lot?

A. As you come out of the door, there is a bunch of steps, and you come down and there is the parking lot. That would be on the side street, you know, on right angles with Olympic.

Q. On the following day, on Sunday, you state that your wife put a bobbie pin in your ear?

A. I asked her to look in it, and she said, "There is something in there." So I said, "See if you can touch it." So she reached over and got a bobbie pin and took the back end and put it in, and it was just like touching this (indicating), you could hear it.

Q. What did you do, if anything, to try to get it out?

A. I was sticking my fingers in there, and trying to move it, and I felt it, and I would push a little, and I felt it down in here by pushing, you know. I said, "That will never come out."

Q. You say you could feel something down— [53]

A. Down in here (indicating).

(Testimony of Frederick Hartley)

Q. Underneath you ear? A. About there, yes.

Q. About two inches underneath? A. How?

Q. About two inches underneath your ear?

A. No. Two inches would be way down here (indicating).

Q. How far underneath your ear could you feel this sensation?

A. Well, that would be about five-eighths of an inch.

Q. Five-eighths of an inch under the lower tip of your ear?

A. No, from the ear canal, from the ear opening, you know, the opening in your ear, then five-eighths down, if I remember right, right where I got my finger.

Q. Now, Mr. Hartley, when you said that you felt this burning sensation when the plaster was being put into your ear—

A. I said a warm sensation. I felt it down here, yes.

Q. How far down in your ear did you feel that warm sensation?

A. Five-eighths of an inch.

Q. Five-eighths of an inch from the—

A. That's right.

Q. —outer ear opening? [54] A. Yes

Q. So that when you indicated in your testimony that you felt it down here— A. Yes.

Q. —it would not be that far down?

A. Well, naturally not, no, because that would be in my throat, but I felt it over here (indicating) and here. It felt like I was boxed in, you know.

(Testimony of Frederick Hartley)

Q. Now, Mr. Hartley, to go back to the question: When this material was being put into your ear, did you feel this sensation all over the side of your head?

A. No. I just felt a warm sensation farther than I did on this ear. I didn't feel any sensation on this ear. I just felt a little sensation when he put it in there.

Q. A sensation of warmth?

A. Yes. It felt all right. It didn't bother me.

Q. There wasn't any sensation of its being cold?

A. No, warm.

Q. And that was about five-eighths of an inch from the outer opening of the ear?

A. The outer opening, about five-eighths of an inch.

Q. Now, when your wife put the bobbie pin into your ear, how far did she put the bobbie pin into the ear?

A. She couldn't put it in because it was all blocked up there. [55]

Q. You mean that right out—

A. That's right.

Q. —at the opening of the ear?

A. Yes, as far as it shows on here.

Q. Well, that isn't answering my question, Mr. Hartley. I will go at it another way. You say you put your finger in your ear? A. Yes.

Q. And your statement is that you could touch the object in your ear? A. Yes, sir.

Q. How far did you put your finger in your ear to feel it? A. Three-sixteenths of an inch.

Q. Three-sixteenths of an inch?

A. You could feel it with your little finger.

(Testimony of Frederick Hartley)

Q. From the outer opening?

A. From where you can put it in, and there it stopped, you could feel it.

Q. Did you put your finger into your ear after your wife put the bobbie pin in, or before?

A. Before.

Q. And you could feel, when you put your finger into your ear about three-sixteenths of an inch you could feel a sensation in your ear? [56]

A. Yes, hard, and I could feel—I would push and I would feel right in here (indicating), like here, just like it was all in there, like that I could feel it.

Q. You could feel when you pushed on the substance or this object that was in your ear?

A. Yes, I could feel it down in here (indicating).

Q. You could put your other hand on the outside of your ear and feel it?

A. No. I could just feel it, and I felt a sensation, and, naturally, if I have something in my ear and I push it, and I feel it, I feel it inside. I don't know. I might feel it here, but I don't suppose it is down there, but only you know it is there. So I says, "There is something in my ear; he must have forgot to take it out." So I asked my wife to see what it was, and she says, "It is hard as a rock."

Q. Now, what, if anything, did you do to try to remove it?

A. I didn't remove it. I didn't have anything to remove it with.

(Testimony of Frederick Hartley)

Q. Did you make any effort to remove it?

A. Sure, with my finger tried to dislodge it, and shake my head and try to get it out. I didn't know what it was.

Q. That is all you did? A. Yes. [57]

Q. Now, when you went to work on Sunday did any one else look at your ear? A. Yes.

Q. Who looked at your ear?

A. Well, my employer looked at it, and he looked in it and just touched it, put a little metallic piece in there, and it was just like that (indicating), you could hear it like that.

Q. What sort of a metallic instrument did he use?

A. It wasn't an instrument. It was just a piece of rod, a small blunt piece of rod, because he couldn't get—just to see how hard it was.

Q. He could see this in your ear very readily?

A. Yes. He said I should go to a doctor.

Q. How deep did you have this sensation in your ear when he would tap it with this piece of rod?

A. How deep?

Q. Yes.

A. Well, like I said before, it was a funny feeling. It felt like it was formed there and it was boxed in, and it was there, and it seemed to be all over, you know, and I wanted to get it out. It felt like it had to come out.

Q. What efforts, if any, did you make at that time to take it out? A. To take it out?

(Testimony of Frederick Hartley)

Q. Yes. [58]

A. Didn't make any efforts. They all told me, "You better leave that alone and go to a doctor, and let a doctor look at that."

Q. Did you make any other efforts to take it out?

A. No, just trying to get it out by moving my head and feeling it. Then they sent me to a doctor.

Q. When did you go to Dr. Ghrist's office?

A. Monday afternoon. That would be on the 15th, Monday afternoon.

Q. You worked that morning, Monday morning?

A. Yes, sir.

Q. And when you came from the hospital on Wednesday, you went to work, did you not?

A. No, sir.

Q. Where did you go when you left the hospital?

A. I stopped—on my way home I stopped at the factory and told them—they all came up to see me the night before, and they couldn't see me, and so when I got out of there, it was on my way home and I stopped in, and they told me to go home and go to bed.

Q. When did you return to work?

A. The next morning I went in. I didn't go at the regular time. I got up a little late, and, you know, they liked me to work and I didn't want to lose any time, you know, because I was well, you know, outside of that bum ear. That's [59] all.

(Testimony of Frederick Hartley)

Q. And when you returned to work, you worked, with the exception of the time you went to the doctor's office, continually?

A. No. I took time off, and one time I got dizzy and sick and I should have gone home about 10:00 o'clock and then I went home about 1:00.

Q. When was that?

A. That was the Thursday following that.

Q. That would be the following Thursday, a week?

A. That would be the same Thursday of the week of the operation.

Q. That would be the following day after you returned from the hospital?

A. No. Let's see. Wednesday, Thursday—no, that would be the week following, the Thursday a week from that. That would be the 15th—what day would Tuesday be, the operation, the 17th?

Q. Tuesday would be the 16th.

A. Tuesday would be the 16th, the operation?

Q. Yes.

A. The next day would be the 17th, when I got out.

Q. Yes.

A. And the next day would be the 18th. That would be the 25th. [60]

Q. It was about that time?

A. About Thursday, because I went home, I couldn't stand any more, and I finally went home, and then I went back the next noon-time to work.

(Testimony of Frederick Hartley)

Q. On Friday?

A. Yes, I went back. I never stay out of work.

Q. When was it that you had this breaking sensation in your ear? A. What time, you say?

Q. When did this drainage start in your ear?

A. The draining—well, my ear was getting—started to get worse then, you know, and I kept rubbing it, and I figured it would get better eventually, but it didn't. It kept getting worse. So I thought I was getting more infection. I got sick to my stomach, and I went home, and my wife put me to bed, and then I got up. So that was on a Thursday, and I went to work. I didn't go Friday morning. I went in about 1:00 o'clock, or 2:00 o'clock, and went to work for a couple of hours, and then I came home, and didn't work Saturday and Sunday. Then I came home, and on Saturady I felt terrible. I really didn't feel good, and I went to bed that Saturday night, and then something busted, and a lot of yellow matter and blood started coming out, and then I felt good. [61]

Q. And it didn't pain you after that?

A. No; just left me, you know, that there was something there. Then it started getting better from then on.

The Court: I believe we will take our recess now, Mr. Wheeler.

Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate during the recess.

(Whereupon, at 12:05 o'clock p. m. a recess was taken until 2:00 o'clock p. m.) [62]

Los Angeles, California, Wednesday, May 8, 1946. 2:00 P. M.

The Court: All present. Proceed.

Mr. Moore: If your Honor please, I noticed that your Honor mentioned the Zenith Radio Corporation in connection with Sears, Roebuck this morning. If you will recall, at the pre-trial counsel for the plaintiff consented to a dismissal against all other defendants.

The Court: I remembered that. Still I wanted to interrogate the jury.

Mr. Moore: Yes, certainly. Now, subject to your Honor's approval, Mr. Wheeler and I have agreed to put Dr. Ghrist on. He has kindly consented to come in, and if that may be done out of order at this time?

Mr. Wheeler: Surely.

The Court: Certainly.

DR. ORRIE H. GHRIST,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

The Clerk: Will you please state your name?

The Witness: Dr. Orrie H. Ghrist, G-h-r-i-s-t.

By Mr. Moore:

Q. Dr. Ghrist, where do you reside?

A. Glendale. [63]

Q. What is your business or profession?

A. I am an eye, ear, nose and throat specialist.

Q. Are you an M. D.? A. Yes.

Q. Are you practicing at the present time?

A. Yes.

(Testimony of Dr. Orrie H. Ghrist)

Q. How long have you practiced as an eye, ear, nose and throat specialist? A. Over 20 years.

Q. Are you a graduate of any university?

A. Stanford University.

Q. And you received your doctor's degree there?

A. M. D. degree.

Q. Will you give us a little history of what your work has been since that time, since the time of your graduation? A. You mean concerning—

Q. Concerning the practice of eye, ear, nose and throat.

A. The speciality of eye, ear, nose and throat?

Q. Yes.

A. I specialized in Vienna, Austria. I every year have spent a certain number of weeks in postgraduate work. I have spent time in postgraduate work at Temple University. I am a diplomate of the Congress of Auro-Laryngologists, which is a certificate you receive that you have been recognized as a specialist in that field. [64]

Q. You mean in the eye, ear, nose and throat field?

A. Yes.

Q. How long have you been practicing at Glendale?

A. Over 20 years.

Q. Now, on or about the 15th day of October, 1945, did you have any occasion to examine Mr. Fred Hartley, who is in the court room?

A. On October 15, 1945, Mr. Fred Hartley, the gentleman sitting there, age 46, who said his address was 338 East Beverly Boulevard, Pico, came to me for an ear examination, and he stated that he had been having a mold made for his ear.

(Testimony of Dr. Orrie H. Ghrist)

Q. May I interrupt for a moment, and ask you, Doctor, what are you reading from?

A. I am reading from the transcript of the record dictated while he was in the office.

Q. That is a regular record of yours, kept in your office in your regular routine?

A. Kept up daily, as I see the patient.

Mr. Wheeler: May I ask one question, Doctor? Do you have any independent recollection of the examination or the material or the matter which you are reading?

The Witness: If you are not fussy about dates, I have a very definite recollection.

Mr. Wheeler: Surely. [65]

The Witness: —because I never saw a guy with plaster of Paris poured clear down to the eardrum before.

Q. By Mr. Moore: Using your record, Doctor, to refresh your recollection on the dates, and I understand otherwise you are able to tell us what, if anything, you did and what examination you made in connection with Mr. Hartley?

A. If you are not interested in exact dates, I can tell you all about it.

Q. Well, I am interested in the dates, but except for telling us the dates that he came there, will you tell us what, if any, examination you made?

A. The gentleman came into the office complaining that he had some place, I believe he said Sears and Roebuck, but I don't remember—some place, anyway, had tried to make a mold for a hearing aid for him, and he said he was in quite a bit of pain, and that there was

(Testimony of Dr. Orrie H. Ghrist)

still something in his ear, and he couldn't hear, that they could not get it all out. And I looked in his ear.

Q. Do you recall which ear, doctor?

A. Yes, I am quite sure it was the left ear, but I had better check on that to be sure. (Examining record.) The left ear.

Q. All right.

A. And I looked in his ear and saw a white hard mass which filled the inner third of the ear canal. [66]

Q. Now, will you explain to the court and jury where this ear canal is located?

A. Yes. Right here (indicating).

Q. You are indicating by placing your finger directly in your ear?

A. Yes. It is the canal which leads into the ear, from the outside ear into the eardrum, and this mass was in the inner third of the ear canal.

Q. Did you give Mr. Hartley any treatment at that time? A. Yes, I tried to remove it.

Q. Will you please explain what you did in that regard?

A. I tried with all the instruments I had to remove it, but it was so painful that it was impossible. It was excruciating.

Q. How could you tell that, Doctor?

A. I say that not only from the actions of the patient, but from the knowledge of the fact that the inner third of the ear is exquisitely tender, and isn't able to stand any manipulation, and any time I got an instrument in between this white material, which I assumed to be plaster of Paris—it was a white material and looked like plaster of Paris—every time I got my instrument in there

(Testimony of Dr. Orrie H. Ghrist)

and made any pressure, he was in severe pain, and I made no headway. [67] I wasn't able to budge the object.

Q. You used the word "exquisitely." What do you mean, Doctor, when you are using it in that way?

A. Exquisitely painful, severely painful. It is a very delicate membrane, and any pressure on the eardrum, the farther you get anything into the ear, the more painful it becomes.

Q. Were you able to remove that substance?

A. Not on that day. I worked there from perhaps a half an hour to an hour, and I worked off and on during the afternoon.

Q. What seemed to be the difficulty to get it out?

A. It was molded into the ear canal, and I could not get a purchase on it.

Q. By that you mean you could not get a grasp on it? A. I could not get a grasp on it.

Q. What was the consistency of the substance?

A. It was white and hard, the consistency of plaster of Paris.

Q. I believe you stated that you had not seen that sort of substance in that position before, in your recollection?

A. Fortunately, I have not.

Q. Now, did you give Mr. Hartley any other treatment on that first visit, other than attempting to remove this object? [68]

A. I believe I advised him to soak it with fluid to see if he could soak it up any during the night, and to come to the hospital the next day and I would give him an anesthetic and remove it under anesthesia.

Q. What fluid did you recommend?

(Testimony of Dr. Orrie H. Ghrist)

A. Well, I will have to look (examining record). I don't remember.

Q. Did you attempt to soak it up yourself?

A. We soaked it off and on all afternoon.

Q. What did you use?

A. We used water and potassium iodide.

Q. What hospital did you tell him to go to?

A. Physicians and Surgeons, 211 West Laurel Street, Glendale.

Q. Did you see Mr. Hartley following this first visit on October 15th, 1945?

A. I didn't see him following on that day. I kept him around the office, trying to get this thing out, much of the afternoon, and we sent him to the hospital the next morning, and that was on October 16th.

Q. Did you see him at the hospital?

A. At the hospital I saw him, and we took him up to surgery, and Dr. Elsie Arbuthnot gave him pentothal anesthesia intravenously, and I scratched away at this material until I could scratch it into about two pieces, and finally into three [69] pieces, and then removed these pieces a piece at a time.

Q. About how long did it take you, Doctor?

A. It took me about 45 minutes.

Q. In scratching at the material, did you come in contact otherwise with the membrane of the ear?

A. Well, I tried not to, but undoubtedly I did, because by force of circumstance, being molded to the canal, I would have to touch the canal to start my downward scraping.

(Testimony of Dr. Orrie H. Ghrist)

Q. Now, after you removed that, what did you observe in the lower one-third of the canal?

A. First, I observed that it was a mold of the eardrum, the material that I removed. It had laid next to the drum, and when I removed it I notice there was no hole in the eardrum. I notice that there was a severe amount of inflammation, and the membrane began to swell within a few minutes after the material was removed from the inner third of the ear canal.

Q. Where was this inflammation?

A. On the canal wall and in the eardrum.

Q. Did you give him any treatment at that time, that is, in the hospital, after the removal of the substance?

A. Other than to flush it out and use a disinfectant, I don't recall.

Q. Did you see him any further in the hospital?

A. I saw him again on October 17th, and my note says [70] he was to go home that day.

Q. I gather from that that you gave him no treatment on the 17th?

A. Other than to look at it, and it looked like there wasn't anything to do until the inflammation went down. The foreign body was removed.

Q. Did you see Mr. Hartley again?

A. On October 19th he came to my office stating that he still felt dizzy and sick, and we gave him at that time some sulfadiazene.

Q. Did you look at the ear at that time?

A. Yes.

Q. Do you recall what you saw?

A. It looked—the eardrum was quite red and swollen. The handle was quite red and swollen, the flaccid or upper

(Testimony of Dr. Orrie H. Ghrist)

portion of the eardrum was swollen and thickened, and the inner third of the canal was extremely swollen.

Q. You gave him no treatment at that time other than to prescribe the sulfadiazene?

A. I didn't see anything I thought was indicated except the sulfadiazene.

Q. Now, did you see him again, Doctor?

A. I saw him again October 22nd, at which time he was improved, and we discontinued the sulfadiazene.

Q. Other than that did you do anything at that time in [71] the way of treatment? A. No.

Q. Did you see Mr. Hartley again?

A. October 29th, November 2nd and November 9th.

Q. What, if anything, was done on any of those days in the way of treatment?

A. On November 2nd there was—the whole thing had subsided markedly and was about all gone, so at that time we did an audiograph on him to see how much he could hear, or how much he couldn't hear. And then on November 9th I have a note that he looked normal, and we discharged him.

Q. Now, at any time was there any infection in the ear?

A. Well, I would say it is like you get your thumb hit with a hammer, and it gets awfully inflamed, but is it infected? There may have been some infection, but that wasn't the big thing. It was the injury, the pressure of the foreign body that caused the trouble. In any of these things where the surface is broken, you may have a little infection, and there must have been a little infection because I would not have given him the sulfadiazene on October 19th had I thought that it was merely pressure.

(Testimony of Dr. Orrie H. Ghrist)

Q. You have it indicated?

A. I had the impression that day that he must have had some infection with this thing. [72]

Q. With his reddened inflamed condition, is that normally accompanied by pain? A. Severe.

Q. Would you say that it was proper to pour a substance of that type into the inner canal of the ear?

Mr. Wheeler: If your Honor please, I object to that question on the ground that without proper foundation it calls for a conclusion of the witness and the answer is purely speculative.

The Court: I don't know, but I think an aurist ought to be able to express an opinion on that.

Mr. Wheeler: Well, whether it was proper to pour into the ear—

The Court: If it is the adjective in describing it, the objection is well taken. But the subject-matter of the inquiry in so far as a specialist on the ear is concerned I think would be a proper interrogation. Probably you can reframe the question so as to eliminate the question of pouring. That has a connotation that may not be definite in the evidence.

Q. By Mr. Moore: Doctor, would the injection into the lower third of the canal of the ear of a plaster of Paris-like substance be likely to cause trouble in that section of the ear? A. Almost always. [73]

Mr. Moore: No further questions.

Cross-Examination.

By Mr. Wheeler:

Q. Doctor, when you began, or, when you first examined Mr. Hartley's ear on October 15th, you say

(Testimony of Dr. Orrie H. Ghrist)

that you found this obstruction or foreign body in the lower third?

A. If he is lying down, with his head down, it is the lower third. If he is up, it is the inner third.

Q. The inner third? A. Yes.

Mr. Wheeler: This diagram may, for illustrative purposes, be helpful. I don't know where to put it, your Honor.

The Court: Put it on that easel, and there is a pointer there somewhere, I believe. Can you see that, Doctor?

The Witness: Yes.

Mr. Wheeler: I was wondering if it might be more convenient for you, Doctor, to come down here, and you can probably explain this.

The Court: Yes. Just take the pointer and sit down in that chair there, and, Doctor, if you will raise your voice, please, so that the reporter can hear you.

Q. By Mr. Wheeler: Will you point out on this diagram where this foreign body was, Doctor?

A. The foreign body lay approximately from there [74] (indicating) into the eardrum, making a mold of the drum itself, and being in immediate molded contact with the entire inner one-third of the ear canal.

Q. Do you recall from your examination of Mr. Hartley's ear whether the position of the canal and the general characteristics of that diagram of the ear are similar to his?

A. Approximately. We all have variations. Some ear canals are relatively straight and some are rather crooked, but, as I recall, his wasn't so very crooked, because otherwise I would have had more difficulty in

(Testimony of Dr. Orrie H. Ghrist)

scratching away all of this plaster of Paris substance that I had to scratch through before I could finally scratch away pieces of it to break it away from the eardrum.

Q. What was the thickness of the body in the ear?

A. The foreign body?

Q. Yes.

A. Well, about that long (indicating), and the diameter of the canal. I would say one-third of an inch. I may be off a little one way or the other, but approximately a third of an inch.

The Court: What would be the length measurement, Doctor?

The Witness: About from here to here (indicating) is about one-third of an inch, which was the plaster of Paris mass. It was my impression that the canal probably would have been full, and whatever happened was they broke off the [75] outside part and left this mass in the inner third, which they could not naturally pull out with the other mass.

Q. By Mr. Wheeler: Doctor, upon what do you base that conclusion?

A. The surface looked broken, as I looked in there.

Q. The surface of—

A. Of the plaster of Paris.

Q. The outer surface of the plaster of Paris?

A. As I looked in there. We will say the plaster of Paris substance. I don't know what it was. As I looked at the surface—well, if you pour plaster of Paris in a dish, it has a smooth surface, but if you break it, it has a rough surface, and the surface which faced me,

(Testimony of Dr. Orrie H. Ghrist)

faced out that way, was roughened as though it had been broken off.

Q. That could have occurred by efforts being made to take that object out, could it not have been?

A. Well, my impression of that is that if you pour it clear full of the canal, you are never going to get it all out by pulling.

Q. But that could have been—

A. An effort to take it out?

Q. Yes.

A. I don't think any other ear doctor took a look at it before I did.

Q. Well, we are indulging in speculation now, Doctor, [76] and that is your conclusion that you drew?

A. Yes. Well, the only effort that it appeared to me that had been made to take it out had been when they pulled the original mass out. Maybe they frogged around in there. I don't know.

Q. What was the depth in the ear between the outer opening of the ear and the outer edge of this mass?

A. The ear canal is about that deep, a little over an inch. I wouldn't be specific on that. About that deep, and it was two-thirds of that distance from the outside of the ear in to about there.

Q. Would it be possible to reach your finger—

A. No.

Q. —into that substance? A. No.

Q. Was the substance readily observable without opening the ear?

A. Well, that I could hardly say, because we always look with head mirrors, and we never make any effort

(Testimony of Dr. Orrie H. Ghrist)

to take them over to the window and look in. I mean I have no idea. It should have been immediately after the thing occurred, although I don't know. It depends on who is looking and how much he knows about guiding light.

Q. Well, in other words, it was necessary—I mean, to observe this obstruction or this foreign body in the ear, [77] it was necessary to insert a light and look into the ear in that way?

A. I am not at all sure of that, because often we can see the whole eardrum in an ear and examine it without inserting any light.

Q. Well, do you recall as to this particular ear—

A. I don't remember.

Q. —as to whether you could see it without?

A. I don't remember.

Q. Without using a light?

A. I don't remember.

Q. Or whether it was possible to see it without opening up the ear with an instrument, or pushing the various parts of the ear to one side?

A. I would be of the opinion that had I taken the gentleman over to the window, and had I known enough about light to have gotten my head in the right position relative to the position of the window, that I could have seen the white mass.

Q. Well, but it would still be your opinion that you would have to get the light into the inner ear from a particular direction to be able to see it?

A. Well, let me explain it this way: Last week I went fishing and I could see the fish-hook that far down

(Testimony of Dr. Orrie H. Ghrist)

in the fish's throat, and my boy couldn't see it at all, because [78] I knew which way to hold the fish.

Q. That is true, Doctor. What I am asking you is whether by merely putting his head on the table without the use of light you could observe the structure, or, this foreign particle?

A. I am quite sure that I could have, but I don't think my sixteen-year-old boy could have.

Q. Or the average person?

A. I don't know about the average person.

Q. Now, do you have these particles or pieces, Doctor?

A. I don't know. As a rule, those pieces are picked up in the surgery and sent to the laboratory, to the pathologist, and they are under the care of the hospital. If they are there, they are under the pathologist's report, and would be in his care at the Physicians and Surgeons Hospital.

Q. Well, was any request made of you to produce those pieces? A. If so, I don't remember.

Q. In accordance with your practice, if such a request had been made, you would produce them?

A. If I had them.

Q. Or if the pathologist had them, I mean they would be available to you? A. He could produce them.

Q. Who is the pathologist? [79]

A. His name is Doctor—it is Dr. Kimball's laboratory, and there are three doctors there, and who was in charge at that time, I don't know. But I can make some very definite statements about it. It was approximately one-third of an inch long. It was a mold of the eardrum, so it had to be in contact with the eardrum, because I held it up and examined it carefully immediately

(Testimony of Dr. Orrie H. Ghrist)

thereafter, to try to notice if it had the contour of the eardrum on it, and it was a negative mold of the eardrum.

Q. You could observe the—

A. The impression of the handle, and the position of the drum, and the position of the soft part of the eardrum up here (indicating). By the way, that isn't a very good picture, that handle that shows along the eardrum. I don't know where you got that one.

Q. Then you stated that you did make an examination immediately after?

A. Very definitely, because I wanted to know. It is the common procedure in these thing to put cotton down on the top of the eardrum for the inner half of the canal, and then pour in the plaster of Paris, and I wanted to know if the plaster of Paris had mashed down some cotton on to the eardrum, or whether or not there had been no cotton put in, and the plaster of Paris was exactly against the eardrum, and that is what made it so difficult for me to dig it out. When you [80] are digging a mass that hard, and you are against a membrane as delicate as the eardrum, and you have, of necessity, to use instruments which are sharp or chisel-shaped, you are very anxious as to whether you are on that eardrum or not.

Q. Certainly.

A. That is why I was so positive as to its examination on removal.

Q. And you made an examination of the eardrum after the removal of the foreign body?

A. Yes.

Q. What was its condition?

A. It was intact, but red and inflamed.

(Testimony of Dr. Orrie H. Ghrist)

Q. Was there any other damage, or was there any damage other than inflammation?

A. Well, apparently I had the feeling within a few days that there was a little infection which had accompanied this thing. If you take any foreign body and hold it against a membrane a length of time there is generally a little infection, but the infection wasn't an important problem in the first day or two.

Q. Doctor, coming back to this question, with the exception of possible infection or inflammation, was there any damage to the eardrum?

A. No. You have made the exception of the inflammation?

Q. Yes, that is correct. [81]

A. That is right. It was inflamed and it was irritated, and it was all those things, but it was not torn.

Q. Now, you made a subsequent examination of the eardrum, did you not? A. Yes.

Q. And I think you made an audiogram on November 2nd?

A. I believe that is the date as stated a while ago (examining record). 11-2-45.

Q. You made an examination of the eardrum at that time? A. Yes.

Q. And what was its condition?

A. It was practically healed.

Q. When you say "healed," Doctor, what do you mean?

A. Practically all the redness was gone, and it was practically back to the state which I assumed it was in before he had this experience.

(Testimony of Dr. Orrie H. Ghrist)

Q. Yes. There wasn't any tearing or any—

A. At no time did I see any tearing.

Q. —that had to heal, in that sense of the word?

A. No.

Q. On November 9th, when he was discharged, there was a complete absence of inflammation or infection?

A. Yes.

Q. Doctor, did you make any examination of Mr. Hartley's right ear? [82]

A. I have no note of it here except the audiogram.

Q. At the time of the making of the audiogram?

A. Yes.

Q. What does that show?

A. I have no notes of an examination of his right ear, except the audiogram report.

Q. Now, what does the audiogram report of examination show with reference to the two ears?

A. Well, just what do you want me to say? I mean—

Q. I don't know what it shows, Doctor. I can't tell you what to say because I don't know what the answer is.

A. Well, it showed here that he had a fairly good nerve on either side from the—Perhaps I had better draw it if you really want to know—

Q. That would be fine.

A. —because it is not as simple as just talking. Would you want me to lay this over—

The Court: Yes, put it over on the other side.

The Witness: And is there some chalk?

The Court: There ought to be some there.

Mr. Moore: May I have that copy, and maybe I can see one, and you can see the copy.

(Testimony of Dr. Orrie H. Ghrist)

The Witness: Have the jury a copy of the audiogram?

The Court: Never mind about the jury, Doctor. You just answer counsel's question and we will take care of the jury. [83]

The Witness: Well, in audiograms, like with a piano, we try to measure the tone vibrations that the patient can hear. This (drawing) is 128 vibrations, 256 vibrations, 512, 1,024, 2048, 4096, and 8,192. In other words, most of the hearing is down in this scale right through here (indicating), and in the audiogram it showed that the ears are approximately the same in his audiogram reading, and I will give the left ear here. At 512 vibrations the nerve of hearing—not the hearing, the nerve of hearing, and that does not mean what he hears—was normal. At 1,024 vibrations the nerve of hearing was normal. At 2,048 the nerve of hearing was down only about 5 degrees, just within the realm of normal.

The Court: Now, what are those side figures, Doctor?

The Witness: Those are losses in terms of decibels, and, relatively, the lower down you go the poorer the hearing, and if you stay up by this normal line, the zero line, the hearing is supposed to be normal. So with the nerve of hearing. His nerve of hearing was excellent in his range of hearing, and that is his left ear, and it dropped off to 40 per cent, which is not an abnormal drop for a man of his age, a little more than normal, it dropped off out in that manner (indicating). But his curve of what he actually heard was something like this (indicating), which was rather poor, and that is probably why the gentleman was wearing a [84] hearing aid. He had a pretty good hearing nerve. And the other ear is

(Testimony of Dr. Orrie H. Ghrist)

approximately the same curve. The man had a pretty good hearing nerve through the conversal area, but drops off on the top C of piano, and isn't much good. But his curve of hearing was quite poor, so he was probably wearing a hearing aid in order to build up this noise to where he could conduct it into the nerve of hearing. This was on November 2nd.

Q. By Mr. Wheeler: And the diagram for the right ear would be approximately the same?

A. Approximately the same. It is a little better than the left.

Q. Now, from your examination, Doctor, did you make any diagnosis of the cause of deafness?

A. No, I didn't make any effort to, but it was my impression—I mean, I didn't run him through any farther than that, but it was my impression it was a catarrhal deafness, or what we call a conduction deafness, which means the air—

Q. We can just leave that off there.

A. I will just show you how it worked (referring to diagram). The nerve of his hearing from there in, in the nervous portion, was apparently all right, but he had what we call a conduction deafness. The sound is not conducted properly from this point into the inner ear. [85]

Q. And that was the same condition that was present in his right ear? A. In the other ear, yes.

Q. Are there any common causes of that condition?

A. We can say they are all catarrhal. A lot of them are catarrhal. It is catarrhal, or it is something that keeps these bones from properly transmitting a sound. The reason we know conduction deafness is that because

(Testimony of Dr. Orrie H. Ghrist)

the sound is not conducted from here to here (indicating), but the patient, were it conducted, could hear it.

Q. Excuse me, Doctor, but what do you mean by catarrhal deafness?

A. The older doctors always used to have the feeling that the patient had catarrh, and a snotty nose, and they blew it up and it kept or caused this Eustachian tube to be inflamed, and that caused a little pressure up here and it did not open up properly, and these bones could not function properly.

Q. I see. Upon examination of his left ear you found that the cone of light was present?

A. I don't remember that. I have no note as to the cone of light. When fellows can't hear any better than that, they don't generally have a very good cone of light.

Q. When Mr. Hartley first came in to see you, Doctor, he had a conversation with you, did he? [86]

A. Well, if so, I don't remember it.

Q. You don't remember the conversation?

A. In my office the nurse says, "Here is a guy with something in his ear."

Q. That was as you recall it?

A. That was as I recall it. He did say this: He told me—I remember this much of a conversation, that he told me he had gone some place to have a hearing aid made, and somebody had decided to make a mold and had poured some plaster of Paris in his ear, and he thought the guy poured too much of it in, or something to that effect. And when I looked in there, I concurred.

Q. Referring to your notes again, Doctor, it was on October 19th that Mr. Hartley came to you complaining that he felt dizzy? A. I have October 15th.

(Testimony of Dr. Orrie H. Ghrist)

Q. That is originally, but I am beyond that. After the time of the operation, if you advert to your notes as to October 19th, was it on that date that Mr. Hartley came to you and said that he felt dizzy and sick?

A. Yes.

Q. And it was at that time that you prescribed—

A. Put him on some sulfa.

Q. —the sulfa. It was on October 22nd that an examination of the ear disclosed that the condition was so [87] improved that you discontinued the sulfa?

A. Well, I didn't say "so improved" in my notes. I said the condition was improved, and I thought it was all right to discontinue the sulfa.

Q. Yes. In other words, the disinfection, or, I mean the infection—

A. Sometimes sulfa clears up an infection rather rapidly, within 24 hours.

Q. And that was the appearance of the infection on October 22nd?

A. Well, it looked like the infection—everything was subsiding, so I discontinued the sulfa.

Q. Yes. Doctor, did Mr. Hartley ever call to your attention any sensation that he had on the left forehead, the left side of his forehead, or above his ear?

A. If so, I don't remember.

Q. Would there be any relation, in your experience, between the condition which you have treated and a sense of discomfort, such as a fly walking on your hair—I mean that sensation?

A. Oh, I think there could be, because often I have been called out in the middle of the night to open an eardrum because the doctor thought there was an abscess

(Testimony of Dr. Orrie H. Ghrist)

there, and I found the eardrum perfectly normal, and it was an abscessed tooth down in the lower jaw. We have referred pains and [88] sensations from inflammations.

Mr. Wheeler: I think that is all, Doctor.

Mr. Moore: Your Honor, may I ask one or two further questions, please?

The Court: Yes.

Redirect Examination.

By Mr. Moore:

Q. Doctor, you said you examined the end of this piece of material nearest to the drum to ascertain if there was any cotton there. Did you find any?

A. No.

Q. Did you find any on the drum when you looked at it? A. No.

Q. Now, do you recall in the last week or ten days a telephone call from me in which I asked you regarding the foreign substance taken from the ear?

A. Yes. You asked me if it was some foreign substance, and I said I thought it was plaster of Paris, and if there was such a substance, it was still in existence, it would be in the laboratory at the Physicians and Surgeons Hospital.

Mr. Moore: Your Honor please, there was one question regarding the bill which I did not ask the doctor on direct.

The Court: Yes.

Mr. Moore: I would ask the privilege at this time to ask that one question. [89]

(Testimony of Dr. Orrie H. Ghrist)

Mr. Wheeler: If it is a question as to the reasonableness—

Mr. Moore: Not the reasonableness, but just the amount of the bill.

Mr. Wheeler: Oh, surely.

Q. By Mr. Moore: Doctor, will you look at your record and see what was your bill to Mr. Hartley?

A. My charge on October 15th was $40.00, and there is a charge of $5.00 for an audiogram on November 2, 1945.

Q. Have those charges been paid? A. Yes.

Mr. Moore: Nothing further.

Recross-Examination.

By Mr. Wheeler:

Q. Does your record indicate, Doctor, by whom they were paid?

A. No. They were paid on January 22, 1946.

Mr. Wheeler: Thank you.

Mr. Moore: No further questions.

The Court: That is all, Doctor.

Mr. Moore: May the Doctor be excused?

The Court: You may be excused, Doctor.

Mr. Moore: I believe Mr. Hartley was under cross examination.

The Court: Yes. [90]

FREDERICK HARTLEY,

the plaintiff herein, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued).

By Mr. Wheeler:

Q. Mr. Hartley, you are using this Zenith instrument that you purchased on that night at the present time, are you not? A. Now.

Q. You recall that your deposition was taken at my office about a week ago, and that I asked you the questions with reference to what the doctor had done to your ear on October 15th?

The Court: Mr. Hartley, please answer so that the reporter can get it. Speak up instead of nodding your head.

The Witness: Oh, yes. Yes.

Q. By Mr. Wheeler: At that time the recollection of the doctor's treatment didn't make you cry, did it?

A. When?

Q. In my office?

A. The recollection of the doctor's treatment?

Q. Well, I will put it this way, Mr. Hartley: You didn't cry in my office when I asked you about the treatment that Dr. Ghrist had given you or the efforts that he had made to remove the piece in your ear? [91]

A. No.

Q. Mr. Hartley, have you personally paid these bills, or have they been paid by some one for you?

Mr. Moore: If your Honor please, I object to that as incompetent, irrelevant and immaterial. If they had been paid by some one else, it is immaterial to this particular case.

(Testimony of Frederick Hartley)

The Court: Oh, I think not. The question is whether he has incurred the obligation to meet those items. If he has, then it is a subject-matter to be considered in this case. Overruled. Read the question, please.

(The question was read.)

The Witness: I personally paid for them and was reimbursed partially by an insurance company that I have an insurance policy with that pays $25.00 for removing any foreign substance from the ear. And as Dr. Ghrist stated his bill was $45.$$, so I paid $20.00, and gave him an insurance check for $25.00. I waited until I got the insurance check for $25.00 before paying the $45.00.

Q. By Mr. Wheeler: With reference to the other bills did you pay those personally?

A. I paid them. They wouldn't let me in the hospital unless I paid them, and I paid them cash right on going in the hospital, and I got a receipt for them.

Q. Have you been reimbursed for any of them? [92]

A. I got reimbursed for a part of the hospital, up to I think it is $6.00 a day, and then the insurance company pays $7.00—I mean, the insurance company pays $6.00, and my bill was $7.00, and my bill come to around $24.00 that I had paid, and the insurance company gave me a check for $23.00 in reimbursing me.

Q. So that of the hospital bills you personally paid $1.00?

A. I paid the difference between $25.00 and $45.00, which the insurance paid. The insurance company had paid $25.00 for removing any foreign substance, and they would not pay any more, so Dr. Ghrist's bill was $45.00, and so I had to pay the other $20.00. I wrote out a check

(Testimony of Frederick Hartley)

and sent him the check from the insurance company for $25.00. So that made a total of $20.00, and $1.00 more I had to pay the hospital, which was $21.00.

Q. I am sorry, I don't understand you with reference to the doctor bill.

A. You asked me—

Q. Or, with reference to the hospital bill. You paid how much for the hospital?

A. Well, I went to the hospital that day and I had to pay $20.00 or $22.00. I don't just remember. It was either $20.00 or $22.00. Then when I was leaving the hospital I had something like $2.04 or $2.34. I had the check, or I have [93] the stub there. And then I gave all these to my insurance company, and they sent me a check for the amount, minus $1.00. They only pay $6.00 for the hospital a day, and I was in one day, and my hospital bill was $7.00. So they added on to the bill which made the $24.00, and so I just paid the extra dollar.

Q. Let me see. I don't want to spend too much time on this, but the record, I think, shows that you paid $24.60 to the hospital.

A. That's right.

Q. Now, then, you were reimbursed $23.60?

A. Something like that, yes; around $23.00.

Q. So that you personally paid $1.00 on the hospital bill? A. Yes.

Q. And you personally paid $20.00 on Dr. Ghrist's bill? A. Correct.

Q. Now, with reference to the anesthetist, the person who gave you the anesthetic, the $15.00, or, no, the $20.00 charge for the anesthesia,—were you reimbursed for that?

(Testimony of Frederick Hartley)

A. Yes. I waited until I got the check from the insurance company and then sent the doctor that.

Q. Now, were you reimbursed for the $2.00 that you spent for medicine? A. No. [94]

Q. So that of the total medical expense that you paid out, you paid $2.00 for medicine, $1.00 to the hospital, and $20.00 to Dr. Ghrist?

A. That's right, yes, sir.

Mr. Wheeler: That's all. I have no further questions.

Mr. Moore: No further questions, your Honor.

The Court: That doesn't figure out just right, according to my mathematics. I am not swearing to it. But the anesthesia was a separate item here,—

Mr. Moore: That is correct.

The Court: —the $20.00, and the doctor's bill was $45.00 in addition to the anesthetist's charge of $20.00. How much did the insurance company pay on account of the doctor's services?

The Witness: It was like this: As I got the bills, I turned them over to the insurance company, and it happened they just gave me the money,—they didn't pay the $20.00 for the anesthesia until about a month or two months later, and I kept getting a bill from the anesthetist, and finally a check came from the insurance company, and then I mailed it to the doctor.

The Court: Then you were reimbursed for the anesthesia?

The Witness: Yes, sir.

Mr. Wheeler: No further questions.

The Court: Nothing further. [95]

Mr. Moore: Mrs Hartley.

MRS. MARIE HARTLEY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

The Clerk: State your name, please.

The Witness: Marie Hartley.

By Mr. Moore:

Q. Mrs. Hartley, you are the wife of Frederick Hartley, the plaintiff in this case?

A. What was that?

Q. You are the wife of Frederick Hartley, the plaintiff in this case? A. That's right.

Q. Now, were you with him on the evening of October 13, 1945, when you went to Sears, Roebuck?

A. Yes, I was.

Q. Were you with him during the entire time that he was there?

A. Well, no, not all the time.

Q. Will you tell us what you did while you were with him on that date?

A. Well, we went in there with the intention of getting batteries, and, of course, he wound up by buying the earphones, and then, to make the story short, he went in to get the [96] impressions made for his ears, and he asked me to make the check out. Well, all the time he was having that done, I was in at the desk having—getting this check. Then when I came back, they were all made, and everything.

Q. In other words, you were not present when the impressions were made? A. Yes, that's right.

(Testimony of Mrs. Marie Hartley)

Q. Did you see the molds after you went back—

A. No, I didn't.

Q. —to where your husband was?

A. No, I didn't.

Q. About what time was it that you left the store, if you recall?

A. It was around 9:00, something like that.

Q. Did you stop at all on the way out?

A. No. Well, yes, we stopped—pardon me. We stopped at the desk, and we were interested in this big book they had there about different banks, you know, and everything, and we wanted to look up our state bank in the state I come from, and we spent about, you might say, about five minutes there.

Q. Before you left—

A. Or a few minutes.

Q. —the store, did your husband have any conversation with you regarding the making of the molds? [97]

A. No. Wait a minute. No, he didn't say anything. He didn't say anything. I didn't see no molds, or anything.

Q. Well, did you have any conversation with him at all before you left the store, after you left the place where the molds were made?

A. After we left the store?

Q. Before you left the store. A. No.

Q. Where did you go from the store?

A. We went to the show.

Q. To a movie? A. Yes.

(Testimony of Mrs. Marie Hartley)

Q. Was anything said to you by your husband at the show regarding his hearing?

A. Yes. He was uncomfortable, he says, that it felt like there was water running in his ear—that there was water in his ear, it just felt that way, and he kept rubbing that one side of his head.

Q. Which side was that?

A. The left side.

Q. Now, that was on Saturday night, was it?

A. Yes.

Q. On the next day, Sunday, October 14, 1945, did you have occasion to discuss with your husband this same ear? A. That is the next day? [98]

Q. Yes.

A. Well, Sunday morning he woke up and he said to me, he said, "I want you to look in my ear." He says, "I feel there is something in it."

Q. Did you look in his ear?

A. And I looked in it, and I had to have a light to see it. You know, I had to turn my light on it, and there I saw this object.

Q. What light did you turn on?

A. My overhead, the ceiling light, and I saw this white substance in there. Well, I didn't know what it was, so I took out a bobbie pin, and took the round edge of the bobbie pin and just tapped it.

Q. Did you attempt to remove it?

A. No, I didn't.

Q. Did you know whether your husband attempted to remove it or not?

A. No. All I know is that he kept pushing his finger in his ear, that's all.

(Testimony of Mrs. Marie Hartley)

Q. Now, did he say anything further to you regarding his ear thereafter?

A. Well, I told him that he really ought to go to a doctor.

Q. Did he go to a doctor?

A. Well, that day, because there was no doctors—we [99] didn't know of any, you know, being Sunday, so we let it go until the next day. So Monday he went to see Dr. Ghrist.

Q. Did you go with him?

A. No, I didn't.

Q. What happened after that with respect to his ear, if anything?

A. Well, then the following day he came home—Monday he came home and said that he had to go to the hospital in the morning for an operation. Well, he got ready and went off the next day, and then I didn't see him until Wednesday, Wednesday afternoon, late afternoon.

Q. Did he ever complain to you about his ear after that time?

A. Yes, he did. It bothered him, and I know when he came home that night from the hospital, I had to put a pad on the pillow because his ear was draining, you see.

Q. That was the night he came home from the hospital? A. Yes.

Q. Which was Wednesday?

A. Yes, that was the day he came home from the hospital. He went right to bed, and his ear drained, because the following morning I noticed it was a good thing I did that, because it was all serum and blood all over the pillow.

(Testimony of Mrs. Marie Hartley)

Q. Did his ear drain at any time after that time, to your knowledge? [100]

A. Well, it drained, yes. It drained right along, you know. Not too much; on and off, and then—well, then he had like the doctor says, he had the infection, and I know when he went to see the doctor, the doctor said he had that infection. It bothered him, and his head ached severely while it was draining and, you know, his head commenced to ache and that was when, oh, I don't know, he was just miserable, and he kept taking aspirins. And I just told him, I said, "Don't take too many aspirins." I know he complained a lot about the headaches.

Q. Did you notice or do you notice any difference in his hearing now than you did before this incident took place?

Mr. Wheeler: If your Honor please, I submit that is calling for a conclusion of the witness. There hasn't been any foundation laid and there aren't any objective standards by which that can be determined.

The Court: I suppose all that a lay person would say would be what he or she observed.

Mr. Moore: That is what I have in mind, your Honor.

The Court: If you will put the question in that form, she can answer. Otherwise it would call for perhaps some scientific knowledge.

Q. By Mr. Moore: Mrs. Hartley, have you observed any difference in the hearing of your husband since the incident, as contrasted with before the incident? [101]

A. Well, yes, I noticed a big difference there.

(Testimony of Mrs. Marie Hartley)

Q. Will you explain what it is that you have noticed?

A. Well, I noticed that before he used to be able to take his earphones off and I could talk to him and make him hear me.

Q. From what distance away?

A. Well, in fact, I could even be in the other room—in a small house in the other room, and I could say—I could turn and I could call him, and he would answer me. But I noticed that later, after the accident, I would be in the same room and I knew he didn't have his earphones on, and I would call him and he wouldn't even respond, so I would have to get up even closer to make him hear me. And I said, "Freddie, I think," I says, "I think there is something wrong. You are really getting much more hard of hearing."

Mr. Moore: That is all.

Cross-Examination.

By Mr. Wheeler:

Q. Do you know how long you were at the check desk, Mrs. Hartley?

A. Well, I was there practically—well, you might say fully 20 minutes. I didn't only stand at the check desk there, but there was some other counters right there, and while I was waiting my turn to get to the desk, I was looking at a few little things right near the desk. [102]

Q. Between the time—

A. Well, about 20 minutes.

Q. Between the time you left Mr. Hartley and returned?

A. Yes. There was a little—now, wait a minute. I will tell you. We spent a little time talking about the set,

(Testimony of Mrs. Marie Hartley)

I know that, when Mr. Owen was trying to sell him the set. We spent a little time there, and then it might have been close to 8:30 or something like that, or it wasn't quite that, and I went over while I was getting that done —I went over and was getting the check at the desk, and I spent a little time talking to the man at the desk, too, so by the time I got through it was, well, about ten minutes of nine, something like that.

Q. Did you look at the clock at that time?

A. Yes, I did. I remember distinctly I looked at the clock. I didn't look at the clock, because I had my own watch then.

Q. You looked at your watch at ten minutes of nine?

A. Yes.

Q. And that was the time you returned?

A. I returned. Then we returned back to the desk. We got everything done, everything was O. K'ed, and we hurried, and we went back to the desk again.

Q. So you looked at your watch, and it was ten minutes to nine? [103]

A. Where are we? Pardon me.

Q. When you returned to your husband, where he was having,—or where he had had these ear molds made—

A. Yes.

Q. And when you returned, the impressions that were made of his ears had been completed?

A. Yes, everything was completed. I didn't see any of it. He was ready to leave, you see, and I gave Mr. Owen the check.

(Testimony of Mrs. Marie Hartley)

Q. And after you gave him the check you turned and left?

A. We went over towards the desk. We had to pass the desk, and we just thought we would stop, and we spent a few minutes there.

Mr. Wheeler: I have no further questions.

Mr. Moore: No further questions.

The Court: That is all.

The Witness: All right. Thank you.

The Court: I think we will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Moore: Mr. Frank Owen, please. [104]

FRANK OWEN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Frank Owen.

Direct Examination.

By Mr. Moore:

Q. Mr. Owen, where do you reside?

A. 422 North Garfield Avenue, Monterey Park.

Q. What is your business or profession?

A. Accountant, formerly.

(Testimony of Frank Owen)

Q. What is it at the present time?

A. Retired at the present time.

Q. Were you employed in the month of October, 1945?

A. Yes.

Q. Where were you employed?

A. Sears, Roebuck & Co.

Q. What was your position with them at that time?

A. Well, I was so-called manager of the hearing aid department.

Q. How long had you held that position with them?

A. About a year at that time.

Q. Will you tell us, briefly, your duties in connection with that position?

A. Well, first, I was selling hearing aids and then [105] selling accessories, and the taking of the ear molds to complete the job.

Q. This taking of the ear molds, what was that?

A. Well, that was securing an impression of an individual's ears so as to send it to the laboratory so that they may complete an earpiece, that they may make an earpiece for the hearing aid.

Q. Were you doing that during the month of October, 1945? A. Yes, sir.

Q. For how long a period prior to that time had you been making impressions for ear molds?

A. One year.

Q. Did you have any training or instruction in that regard— A. Yes.

Q. —prior to commencing that work?

A. Yes.

(Testimony of Frank Owen)

Q. From whom?

A. First, from Mr. McKenna, the supervisor of the hearing aid department of all stores.

Q. You mean all Sears, Roebuck stores?

A. All Sears, Roebuck stores. And Mr. McKenna directed me to the laboratory where the earpieces and ear molds are made, both, for instructions by them. [106]

Q. Where was that?

A. 727 West Seventh Street.

Q. Is that the Clark Laboratory?

A. The Clark Laboratory.

Q. How much training or instructions did you get?

A. There was a sample made, and it didn't take too much time. I spent a little time with Mr. Goodrich of the Clark Laboratories ?

Q. Did you receive any written instructions from them?

A. I think that I received the written instructions, that we had them in the store at that time, and I read them over.

Q. And your Mr. McKenna, did he give you any written instructions?

A. No written instructions, except that he handed this to me and told me to read it.

Q. That is the instructions from the Clark Laboratories? A. Yes.

Q. Do you remember what instructions you received with respect to making of the ear molds?

A. Well, as I said, it is a very simple matter, and there isn't very much to it. Of course, I can tell you, if you wish the description.

(Testimony of Frank Owen)

Q. Yes, I would like to know.

A. In the first place, you see that the outer layer of [107] the ear is covered with an oil.

Q. What kind of an oil?

A. We used a baby oil; any kind of an oil to prevent the plaster from sticking. Then you proceeded to see that there is a piece of cotton inserted in the ear to prevent the plaster from going into the ear.

Q. Going into what portion of the ear?

A. The inner ear.

Q. Is that the same as the ear canal?

A. Well, the ear canal leads to the inner ear, yes.

Q. Were you instructed, were you told the reason why that cotton was placed there?

A. Well, it is obvious. I don't think any one would need to be told why it was placed there, but in Mr. Goodrich's laboratory the gentleman there placed it there, and I read that it should be placed there. Naturally, we did it.

Q. But were you given the reason why it was placed there?

A. I don't know whether any one said, "This is to prevent the plaster from going into the inner ear." That wouldn't need to be stated. That was very obvious, as I stated before.

Q. Then what was done?

A. Then after building up a little plaster so that you might have a sort of a handle on it, you let it set until it [108] gets hard.

(Testimony of Frank Owen)

Q. Do I understand from your instructions that you prepared a plaster-like substance ahead of time before it was put in the ear?

A. Not very much ahead of time. It was prepared right then and put in.

Q. Then it is placed in the ear. And what is its consistency?

A. I would say a heavy cream, or something that will pour easily.

Q. Then what is done, under the general plan of making molds?

A. You take a spatula, or something of that character, and work that plaster down well into the auditory canal, so that when you remove it there will be no break-off.

Q. Do you work it down as far as the eardrum?

A. Oh, no.

Q. Then what is done?

A. Then you let it set.

Q. Does it harden?

A. Until it is hard enough to remove.

Q. Then how is it removed?

A. Well, just by manipulation with the hands, pushing the earpiece away—pushing the ear away from the ear mold, and pulling and pushing the flesh around the ear until it [109] easily comes out. There is not much to it.

Q. After the mold is removed, were you instructed anything further to do with the ear?

A. Yes, we cleaned—we see to it that there is no little surplus particles of plaster that may be around the ear. It may break off a little around the edge and drop on the ear. We see that is cleared away. Then we use the liquid to wash the ear, to wash any surplus away.

(Testimony of Frank Owen)

Q. Did you use any light of any sort in connection with the operation?

A. No, that isn't necessary.

Q. On October 13, 1945, did you have occasion to fit an ear mold for Mr. Hartley, the plaintiff in this case?

A. Yes.

Q. You did prepare molds, did you?

A. Yes.

Q. For which ear? A. For both ears.

Q. Do you know, of your own knowledge, whether the molds as so made were sent to a laboratory for preparation of an earpiece? A. Yes.

Q. I show you Defendant's Exhibit A, and ask you whether you recognize that.

A. No, I wouldn't recognize it. [110]

Q. Would you say with respect to Exhibit B whether you recognize Defendant's Exhibit B?

A. Well, what do you mean by "recognize?"

Q. Do you know what it is?

A. Oh, yes, I know this (indicating) is an ear mold and this is an earpiece.

Q. Do you know whether or not this is the one which was made by you for Mr. Hartley?

A. Well, of course, and if I knew that was Mr. Hartley's earpiece here—

Q. You are pointing to Exhibit A?

A. I am referring to Exhibit A. It is my belief that this ear mold, this Exhibit is not made—I mean to say, the Exhibit A I believe is not made from Exhibit B.

Q. All right. Now. how about Exhibit C?

A. Exhibit A, the earpiece, is made from Exhibit C.

(Testimony of Frank Owen)

Mr. Moore: Thank you. No further questions.

Mr. Wheeler: I have no questions.

The Court: That is all.

Mr. Moore: That, your Honor, is the plaintiff's case.

Mr. Wheeler: If your Honor please, at this time I would like to make a motion to dismiss on the ground that there is no showing of negligence on the part of the defendant, Sears, Roebuck & Co.

The Court: The matter is a question for the jury under [111] proper instructions. For those reasons the motion at this time will be denied, without prejudice. Proceed.

Mr. Wheeler: Mr. Owen, will you return to the stand, please?

FRANK OWEN,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Wheeler:

Q. Prior to the time that you were employed by Sears, Roebuck & Co., by whom were you employed?

A. For 28 years with the Union Oil Company, until 1939.

Q. In Los Angeles? A. Yes.

Q. In what capacity were you employed?

A. As an accountant.

(Testimony of Frank Owen)

Q. What was the date of your employment by Sears, Roebuck & Co.?

A. About November, 1944.

Q. In what capacity were you employed at the time of your original employment?

A. With Sears, Roebuck?

Q. What were you to do?

A. To sell hearing aids, and accessories, and make ear molds. [112]

Q. What type of hearing aid were you to sell?

A. We sold both bone and air conduction instruments.

Q. What make of instruments?

A. They were made by Zenith Radio Corporation.

Q. Now, were you employed in November. When did you receive the instructions from the Clark Laboratories?

A. In the very first week, I think. Mr. McKenna gave me instructions immediately, and then he sent me to the Clark Laboratories.

Q. Now, Mr. McKenna's instructions occurred immediately after your employment?

A. Yes.

Q. Then you were instructed by the Clark Laboratories approximately during the first week of your employment? A. Yes.

Q. Do you know how many ear molds you had made prior to the time that you made the ear molds for Mr. Hartley? A. Oh, I must have made 150 or so.

Q. During this period of approximately 11 months?

A. Yes.

(Testimony of Frank Owen)

Q. Calling your attention to October 13, 1945, I will ask you if you met Mr. Hartley on that day?

A. Yes.

Q. Do you recall where you met him?

A. In the hearing aid department. [113]

Q. And that is located in what store?

A. Sears, Roebuck Ninth Street Store.

Q. Sometimes called the Olympic Boulevard Store?

A. The Olympic Boulevard Store, yes.

Q. Do you recall the time of the evening that you met him?

A. Well, it was—I don't know the time, no; not exactly. It was probably mabye about as has been stated, around about maybe 8:15, 8:00 o'clock.

Q. Do you recall that Mr. Hartley was accompanied by his wife? A. Yes.

Q. Did you have any conversation with Mr. Hartley with reference to the purchase of an ear mold, or, rather, a hearing aid?

A. A hearing aid. Not particularly. Of course, we were selling aids, and if anyone was not getting along successfully with the hearing aid he had, if he had one, naturally we would suggest the testing of a Zenith.

Q. Do you recall what the occasion was that brought Mr. Hartley there? Did he say why he had come to the department?

A. I don't recall that he did.

Q. Do you recall any of the conversation that you had with him? [114]]

A. Well, specifically, no. But I always say to any one who probably is not getting along with their hearing aid, "Let's try the Zenith."

(Testimony of Frank Owen)

Q. He was wearing a hearing aid at the time, was he?

A. Yes, I believe he was at that time.

Q. Do you recall what type of hearing aid it was?

A. A bone conduction instrument.

Q. That is a different type than the so-called air conduction? A. Yes.

Q. What is the difference between bone conduction and air conduction?

A. Well, the bone conduction is like one I am now wearing. The vibrator touches the mastoid bone back of the ear. It may work on any portion of the head. That is bone conduction. Air conduction is one where the vibrator goes into the ear, and goes in with a fitting, a special fitting of some sort or other.

Q. Now, do you recall what you did in connection with Mr. Hartley's visit to the store on that evening?

A. Oh, yes. Mr. Hartley purchased the instrument, and, of course, if he is getting air conduction, why, the best thing he can do, a person getting an instrument, is to have the earpiece made.

Q. What is the purpose of the earpiece? [115]

A. It is to secure a better contact, and also to keep any extraneous noises from entering the ear through the ear canal.

Q. Referring now to the Zenith type of instrument, the Zenith instruments are equipped for either bone conduction or air condition with the ear piece?

A. That's right.

Q. Is there any standard equipment that comes with the Zenith set for air conduction?

A. Yes, there is. There is a set of tips and tubes, as we call them, plastic tubes of different sizes. There are

(Testimony of Frank Owen)

four, and four rubber tips of different sizes, so that the individual can fit his own ear, you see. Some of those, some combination of those four tubes and tips will fit most any one fairly well.

Q. When you refer to a tube, what is it, and what do you use it for?

A. Well, the plastic tube is a little tube with a shoulder on it that snaps on to the ear phone, and on top of the plastic tube is the rubber tip which is to be inserted in the ear for hearing.

Q. How large is this tube that fits on to the receiver part?

A. Oh, I should say three-sixteenths of an inch maybe, the heavy part of it, and it snaps on to the earphone. [116]

Q. How large in diameter is the circular end?

A. Well, it is just a little tube, a little smaller at one end than the other, with a shoulder so that when you put the rubber tip over the tube, it will stay on. There is a shoulder there to keep it from falling off.

Q. The tip then is inserted into the ear, is it?

A. That's right.

Q. Does the tube go into the ear as well?

A. Well, it goes in under the tip, yes. The tip is slipped over the plastic tube. The plastic tube is snapped on to the earphone, and that makes the temporary fitting. We call it temporary.

Q. You refer to it as a temporary fitting?

A. We call it temporary, yes, and we think the earpiece is much better.

(Testimony of Frank Owen)

Q. Now, for the purpose of fitting a person, or fitting a person's hearing aid with an earpiece, what must you do?

A. For fitting, getting an earpiece, you mean?

Q. You make a mold?

A. The first thing to do is to secure the mold, of course, and the person is arranged in a position where you can make the mold, and then—

Mr. Wheeler: If your Honor please, may I ask will we adjourn at 4:00 o'clock or at 4:30? [117]

The Court: About 4:30, I think, or a little before 4:30.

Mr. Wheeler: The reason I ask that is because I was going to ask the witness, for illustrative purposes, to show just what is involved in this process of making a mold, and I just wanted to make certain that we had ample time.

Mr. McKenna, would you come forward, please.

(Mr. McKenna did as requested.)

Mr. Wheeler: If your Honor please, I was going to ask, for illustrative purposes, to have Mr. Owen demonstrate just what was involved in this process of making an ear mold, and relate it to the making of the mold or the two molds that he made for Mr. Hartley. He can show just what was done, and how he did it, and that was the purpose. It will take just about 10 minutes, I think.

The Court: And who is this gentlemen, Mr. McKenna?

(Testimony of Frank Owen)

Mr. Wheeler: Mr. McKenna is the supervisor of the hearing aid department for the Los Angeles district of Sears, Roebuck & Co.

Mr. Moore: Counsel, is he the Mr. McKenna that has been referred to in the previous testimony of Mr. Owen?

Mr. Wheeler: Yes, and he will be offered as a witness subsequent to Mr. Owen.

The Court: Is there any objection?

Mr. Moore: No objection.

The Court: Proceed. [118]

Mr. Wheeler: I think we can use this table.

The Court: But in doing so, use it so that every one can see it. I don't believe those jurors in the back row can see from there. You might have to elevate the table a little bit so that they can see.

Mr. Wheeler: We can push it back a little bit, probably.

Mr. Moore: As I understand it, this is an illustration of how molds are generally made, and it is not an attempt to say that this is the way exactly that it was done with Mr. Hartley?

Mr. Wheeler: That is correct. Then I will relate it, so that we understand what is involved, I will relate Mr. Owen's testimony to it.

The Court: Can you all see this, ladies and gentlemen? I think they can all see it all right.

Mr. McKenna: Now, do you want to get the water?

The Court: Do you want some water, a glass of water?

The Witness: A glass of water will be fine.

The Court: Will a glass of water be enough?

The Witness: Oh, yes.

(Testimony of Frank Owen)

Mr. Wheeler: Mr. Owen, if you will just tell now, as you make this ear mold, what you are doing and the instruments you use, how you seat the person who is going to have the mold made, and so forth.

Mr. Moore: May I ask counsel if Mr. McKenna is likely to [119] make any comments during the course of this?

Mr. Wheeler: None whatever. He is an innocent bystander.

The Court: Is it necessary that Mr. McKenna be here now? He obstructs the view of the jury somewhat.

Mr. McKenna: I will sit down here. I am going to sit down, Judge.

The Court: Now, describe what is being done.

The Witness: I am making an examination now to see if there are any hairs in the ear, which must be removed before you attempt to make an ear mold. Here are the tweezers.

Mr. Moore: I suggest, counsel, that we let the record show that Mr. McKenna has his head lying on the table, with his left ear on the towel, and with his right ear upwards.

The Court: And is sitting on a chair right beside the table.

The Witness: It is immaterial whether you put oil in the ear before you insert the cotton or not, but this cotton is to prevent any foreign substance from going into the ear.

Mr. Moore: And you are inserting that with the tweezers?

(Testimony of Frank Owen)

The Witness: With a little bent tweezers. Now, that is inserted, and we can proceed to clip any little hairs that may protrude, any heavy hairs, with a pair of scissors.

Now, the next thing to do after inserting the cotton and clipping the hairs is to moisten this with oil.

The Court: Moisten what with oil? [120]

The Witness: This Q-tip or common little household thing, with a little cotton on the end, on each end of it.

Mr. Wheeler: A cotton swab?

Mr. Moore: I think it has a trade name, "Q-tip." I know that with my children we use that.

The Witness: Now, we usually have some place where we can squeeze the excess oil off. I will do it on the towel.

Now, we proceed to see that all of the portion of the ear there is moistened with the oil or covered with the oil, so that you have a film, a thin film of oil all over the ear. Now, in order that there may be no excess oil, we just take the other end of the Q-tip and just rub out all of the oil that you can, and that leaves sufficient oil on, you see.

Mr. Wheeler: Can the members of the jury see the depth the cotton is from the outer surface?

The Witness: You can easily see the cotton here.

The Court: Can you get up and assume the same position later on?

Mr. Wheeler: He can't hear you without his hearing aid, your Honor.

,The Witness: You can see the cotton right there.

The Court: You can see the cotton, but I want to know whether the jury can.

The Witness: Show them the cotton in your ear.

(Testimony of Frank Owen)

The Court: You can walk along there, hesitating a moment [121] so that each juror can see what the other jurors see. Now, tell him to walk back up here, so these gentlemen up here can also see it.

Mr. Wheeler: Will you show these other gentlemen?

(Mr. McKenna did as requested.)

Mr. Moore: Your Honor please, counsel has kindly consented in this particular type of demonstration that I might perhaps ask a question here and there rather than wait for cross-examination.

The Court: Very well.

Mr. Moore: If I may ask one question now: Is the cotton there down in what is known as the canal?

The Witness: The auditory canal.

Mr. Moore: The auditory canal.

The Witness: The auditory canal.

Mr. Moore: And this film of oil goes down to the cotton?

The Witness: It should, yes. If it should not exactly go down, you might have a little adherence of plaster at the point you touch.

Q. By Mr. Wheeler: Will you state for the record, Mr. Owen, how far in the canal that cotton appears to be?

A. As to distance I could not state, but I know there is sufficient cotton there to prevent any plaster going in the ear.

Q. No, but can you measure it? I mean, just take [122] something and—

A. Well, from the outer ear, from this piece of the ear right here, from that point on in, it is a distance of

(Testimony of Frank Owen)

half an inch; that is, the top of the cotton that you now saw.

Then after getting the ear parts oiled with oil, then you proceed to mix the plaster.

Mr. Moore: That is a rubber cup?

The Court: Here is a cuspidor, if that is what you are looking for.

The Witness: That is what I am looking for. There is a little excess; more than I need.

Q. By Mr. Wheeler: How much water approximately did you have in the cup?

A. Probably about as much water as plaster.

Q. Equal proportions?

A. Now, I should have a little spoon here, to dip that plaster out. It would make it more convenient. Perhaps I can guess at it this way. It is a little harder to do. That is what happens, you see, when I don't have the spoon, but I can probably guess.

The Court: I am sorry, but we don't have a spoon.

The Witness: That needs to be a little thicker.

Mr. Wheeler: Perhaps you could take the scissors here and use them as a spoon. [123]

The Witness: Maybe I could. I will see if I need that. I am sorry, that isn't quite thick enough yet.

The Court: What is that white powdery substance that you are putting in there?

The Witness: That is what we call ear mold plaster.

The Court: Do you know what its composition is?

The Witness: Probably plaster of Paris, mostly. I do not know what it is.

Now, after this is thoroughly mixed, then it is ready to insert it in the ear.

(Testimony of Frank Owen)

Q. By Mr. Wheeler: Can you take a minute and just show that to the jury?

A. I don't want to take too long. It is just a thick mass, like a heavy cream. I don't want to take too long, because it sets and should be in here.

Mr. Moore: May I ask if there is any reason why a rubber cup is used?

The Witness: No.

The Court: Let him put it into the ear, so that it will solidify.

The Witness: Now we begin to put this in.

The Court: The record shows that the witness is pouring the material into the ear.

The Witness: This operation here is to see to it that all of the plaster,—to see that there are no bubbles in the [124] neck of the earpiece, so that it won't break as you remove it. Now, all we have to do now is to build a little handle on it, as you might say, so that in removing it it will not be a difficult job and we can get it out without breaking.

The Court: The record shows, I think, and I can't see clearly from where the bench is, but isn't the orifice completely obscured by the material?

The Witness: Yes; yes. Now, that happened to be a little soft, and rolled down a little more than it should, but that is because perhaps we didn't have quite the right quantity in there. After you have used a spoon, you know just what the quantity is to put in, in the first place, but that doesn't make any difference. Now, we will let the plaster rest until it sets, and then proceed to remove it.

(Testimony of Frank Owen)

Q. By Mr. Wheeler: Have you had these plaster molds made of your ears? A. Yes.

Q. Is there any warmth generated in the hardening process?

A. There always is a warm feeling there, and sometimes people ask because it is getting a little warmer all the time. Naturally, in any oxidation or letting of plaster dry in an ear, naturally it creates heat.

Mr. Wheeler: What was the oil? You have already identified the oil that you have used? [125]

The Court: Is that what you call the baby oil, Mr. Owen?

The Witness: I don't know about this oil, but it is used. It isn't identified there, but I suppose that is the same as we have used in the store.

Q. By Mr. Wheeler: And the pink colored liquid is the cleansing?

A. Yes, that is the cleansing, the liquid we use after the earpiece is out.

The Court: Do you have any specific time that you permit it to solidify?

The Witness: About five minutes, but that depends a little on the humidity and the mix, the degree of moisture, the water you have in the mix. The thinner you have it, the longer it takes to dry.

Q. By Mr. Wheeler: This arrangement here of the small table is similar to that which you employed, is it, at Sears Roebuck & Company?

A. Yes, similar, only we had a pillow in addition to the towel. We have a towel and place it on the pillow.

Q. But the seating arrangement is similar?

A. Yes, similar, that's right.

(Testimony of Frank Owen)

Q. How do you tell when it is hard enough?

A. Well, a good way is just by striking it with the finger-nail. You can tell when it is beginning to harden, [126] and you can allow a little time when it is beginning to harden. If you should scratch it with your nail, it would be soft.

The Court: Is there any way of determining, Mr. Owen, whether the entire mass that you put into the ear solidifies simultaneously?

The Witness: Well, occasionally you break off an earpiece when you are removing it; if you attempt it too soon, it is likely to break, and then that means that it hasn't had time to harden, and you simply recover the balance of it with the pair of tweezers, this tweezers' kit here.

The Court: Considerable of the material is out in the world, out in the open air?

The Witness: Most of it, yes. The laboratory, of course, don't use much of the plaster. They only use the inside of it, as you have indicated.

The Court: And considerable of the material is on the inside of the ear, which has, in addition to the atmospheric conditions, the warmth of the body?

The Witness: That's right. You see, that was a little thinner than ordinarily, and that will take maybe a couple of minutes extra for drying.

Q. By Mr. Wheeler: You have no way of determining what proportion you used of the water and plaster for this particular mix?

A. Well, in practice, I have a spoon and I got about the [127] right amount, and it is very easy, and if I

(Testimony of Frank Owen)

need additional plaster it is very simple to take half a spoonful, or of water, and I can judge it better than where I have to dump it in with the container.

The Court: Mr. McKenna will be getting tired there.

Mr. Wheeler: He may fall asleep.

The Witness: Well, it isn't quite ready to remove yet. I think that has been there about five minutes now, hasn't it?

Mr. Moore: About six.

The Witness: About six minutes. It is just a little—not quite ready to remove. If that had been a thicker plaster, it would probably be ready to remove now.

Now, the only thing to do in removing the earpiece is to begin simply, as any one would, by pushing the flesh a little bit away on each side, pull your piece over like this gradually, and if you have a patient that is nervous, and all that, you take a little more time. But when one understands what is going on, they don't worry any. Now, we are not quite through yet. We have the earpiece out, and the next thing is to examine the ear, and you may see those little white speckles. You see, there isn't much to do to remove that. In fact, it would not be necessary to do anything, but we always do this.

The Court: What are you doing now?

The Witness: Now, we have inserted this in a little [128] cleansing fluid that we put in there, and we just rub the ear out like this. This probably removes any oil that might be adhering around the face.

The Court: What is that cleansing fluid?

The Witness: I beg pardon?

The Court: What is the cleansing fluid?

(Testimony of Frank Owen)

The Witness: It is probably something like a mouth wash, something of that character. That's all, Mr. McKenna.

Q. By Mr. Wheeler: When you said you take this, you were referring to a Q-tip that you dipped into the cleansing fluid?

A. That's right, these little things here.

Mr. Moore: Did you remove the cotton from his ear?

The Witness: Did I? It wasn't necessary. Just as in all cases, there is the cotton on the earpiece. When you get the cotton out, then you are sure you have a job done. If you don't get the cotton, then you have something else to do. There is the cotton with the earpiece, just as nice an earpiece as you can have. That will cost you $6.00, Mr. McKenna.

Mr. Wheeler: You might pass it along to the jury, so that they might examine it.

(The plaster mold was passed to the jury.)

Mr. Wheeler: Now, if you will resume the witness stand.

Q. By Mr. Wheeler: Referring now to October 13, 1945, and particularly your discussion with Mr. Hartley, what did [129] you do? Did you make an impression of Mr. Hartley's ear?

A. Yes. I first took an impression of Mr. Hartley's right ear. Then with that completed, I took an impression of the left ear.

Q. What did you do in making an impression of the right ear?

A. Well, I went through exactly the process I did with Mr. McKenna, and the same with the left ear.

(Testimony of Frank Owen)

Mr. Moore: That is objected to as a conclusion of the witness, and I ask that it be stricken.

The Court: Well, that would be true. He would have to relate specifically what he did.

Mr. Wheeler: Yes.

Q. By Mr. Wheeler: Will you relate just what you did? A. With Mr. Hartley's ear?

Q. Yes.

A. Well, first Mr. Hartley took the position as Mr. McKenna did, with the right ear up, the first one. I washed the ear with oil, then removed the excess as I did here. I inserted the cotton. Now, I may have inserted the cotton first, or afterwards. It would be immaterial, unless you were clipping hairs, in which case you should put the cotton in first.

Q. You don't recall now whether you put the cotton in first or the oil? [130]

A. I am not sure about that. If I clipped any hair I should have seen to it that the cotton was in first. Then after the cotton is inserted in the ear, you are ready to make the mix for the mold, prepare the mix, see that it is about the right consistency, then pour it in the ear. Then take the spatula and work it well down into the auditory canal, and a little bit into the cotton, so that when you take the mold out the cotton adheres to it, just as it did in Mr. McKenna's case. That was the making of the right ear mold. Then after it was dry I proceeded to extract it, as we did here.

Q. With reference to the insertion of the cotton, Mr. Owen, you used the same amount for each ear?

A. No. No, you should examine the ear, and you can discover some ears are very large, some are small,

(Testimony of Frank Owen)

and when you put in a piece of cotton that is too small, you soon discover it and put a larger piece in.

Q. Well, what do you try to do in putting the cotton in?

A. Well, you try to anticipate the proper amount of cotton, and if you should fail to get the right amount, of course, you simply pull it out with the tweezers and start again with a larger amount of cotton.

Q. Well, with reference to fitting the cotton in the ear, should it be a tight fit or a loose fit?

A. It should be a snug fit, yes. It should fit down with all edges of the cotton packed well so that when the [131] plaster goes up against the cotton it will be a square cut earpiece or mold.

Q. And with reference to the impression that you took of Mr. Hartley's right ear, did you do that?

A. Yes.

Q. Now, after you had taken the impression for Mr. Hartley's right ear, what occurred?

A. Well, we removed the impression, and then we had just dealt for one impression, and Mr. Hartley decided, well, while he was about it, he would have an impression made for the left ear.

Q. Did you have any conversation with him at that time relating to the making of the impression for the left ear?

A. No, I don't recall any, except that I think he said, "I might as well have the other one made." He seemed to feel he had a chance to try both ears, I believe. I don't just recall any special conversation.

Q. And you went ahead then and proceeded with the left ear?

A. Yes.

(Testimony of Frank Owen)

Q. What did you do in connection with the making of a mold for Mr. Hartley's left ear?

A. Well, I did the same as in the case of the right ear. I first swabbed the ear out with oil or put the cotton [132] in. It doesn't make any difference. We will say I put the oil in, then put the cotton in, and then poured the mold—made the plaster and then poured the mold and worked it down into the ear with the spatula, let it dry, and then removed it, and then swabbed the ear out, just to make a clean job. That's all.

Q. When you swabbed the ear out—when you swabbed his left ear out, did you observe any plaster in the auditory canal?

A. No. No, if I had, of course if I had, I would have taken it out. If I could not have swabbed it out, I would have reached for it with something or other. But there was no necessity for thinking there was anything in the ear whatever.

Mr. Moore: If your Honor please, I object to the testimony of what he would have done had he done so-and-so, and I ask it be stricken as merely a conclusion of the witness. It is not responsive to the question as to what he did.

The Court: Yes, I think it should go out, ladies and gentlemen, and also that phrase about there was no necessity for thinking anything. You will disregard that.

Q. By Mr. Wheeler: Your answer is solely that you didn't see any plaster in the ear?

A. That's right.

Q. In the inner ear or auditory canal? [133]

A. That's right.

(Testimony of Frank Owen)

Q. What did you observe with reference to the cotton on the left ear?

A. Well, I remember very distinctly, and I was caused to observe it. Naturally, I would make this observation anyway because when you take the ear mold out the first thing you look for is to look for the cotton, and if you see no cotton, then you know you must recover the cotton that is in the ear, because you have put the cotton there. And, of course, in a casual way, when the right ear mold was taken out, I observed the cotton, and when the left ear mold was removed, we were through, and Mr. Hartley arose and said, "Didn't you leave some cotton in my ear?" And I said, "No," and I pointed to the pair of molds, and there were two just as nice ear molds as you could have, perfectly formed and finished, and the cotton was on both of them. I called his attention to it, that there was the cotton on the ear molds.

Q. Did you have any further conversation with him with reference to that point?

A. No. No, by that time Mrs. Hartley had arranged the check, I believe, and we just closed the deal and Mr. Hartley left the hearing aid department.

Q. Did you ever have any further conversations with Mr. Hartley subsequent to that evening?

A. No. [134]

Q. Did you ever have any conversations with Mrs. Hartley subsequent to that evening?

A. I saw Mrs. Hartley once since that time, and that was a few days afterwards, when she called at the store for the earpieces that had been sent. The ear molds had been sent to the laboratory, and they had been returned to the store, and were actually—I had taken the

(Testimony of Frank Owen)

ear molds down to the mailing division to be mailed out, and Mrs. Hartley called after the taking of them down there, and I told her they were down in the mailing division, but that I thought I could still get them, and I went down to the basement, and, sure enough, I got the earpieces which were prepared for mailing and wrapped by Sears, Roebuck, and handed them to her in person.

Q. When you refer to the earpieces, Mr. Owen, to what do you refer?

A. I refer to the finished product, the piece that the Clark Laboratory makes. It is called an earpiece.

Q. That is similar to Defendant's Exhibit A?

A. It is the plastic piece; it is the earpiece.

Q. Now, the earpieces then for the two ears and the two molds for the two ears were returned; is that correct?

A. Yes.

Q. Do you recall when these molds that you had made on Saturday night were sent to the Clark Laboratory? [135]

A. No, I do not recall the date. The date could be established, of course, by the records.

Q. Do you recall how long after the Saturday night on which you made the molds that Mrs. Hartley—that you talked to Mrs. Hartley?

A. No, I do not know the date that Mrs. Hartley called at the store.

(Testimony of Frank Owen)

Q. Was it a week or two weeks after?

A. Well, it would be approximately a week. It would not be two weeks, and it might not be within the one week, because it takes a few days longer, more or less, for the laboratory to get an earpiece back to Sears.

Q. What time was it when you talked to Mrs. Hartley? A. To Mrs. Hartley?

Q. Yes. A. It was late in the evening.

Q. Well, what do you mean by late in the evening?

A. I mean—I would judge now from your question, it must have been Friday or Saturday night, because it was late at night. I am not sure about that, however.

Q. Did Mrs. Hartley say anything to you with reference to any difficulty— A. Not a thing.

Q. —with reference to the ear molds, or the presence of any foreign substance in her husband's ear? [136]

A. Not a single word.

Q. Did you have any further conversations at any time with Mrs. Hartley or Mr. Hartley? A. No.

Q. Mr. Owen, what time does the Sears, Roebuck & Company, the Olympic store, or Ninth Street store, whichever it might be referred to, what time does it close on Saturday night?

A. At that time it closed at 9:30.

Q. And when are the lights turned out with reference to closing?

A. On Friday and Saturday night the lights—they keep the lights on a little longer than on other evenings,

(Testimony of Frank Owen)

and I couldn't say exactly, but I should say they turn the lights off at 9:45, somewhere around there. The clerks have a good deal of cleaning up to do on Saturday night.

Q. But the store closes—

A. 9:30 is the business hour, they close up business, but the lights remain on for stragglers to get out of the store and for clerks to clean up their accounts, turn in their cash, and so forth.

Mr. Wheeler: I have no further questions. You may examine.

The Court: I think we will defer that, Mr. Moore, until morning. [137]

Mr. Moore: Yes, your Honor.

The Court: Ladies and gentlemen, we will take a recess until 10:00 o'clock tomorrow morning. Remember the admonition and keep its terms inviolate.

Mr. Bailiff, will you pick up that mold and give it to the clerk, please?

Mr. Wheeler: If your Honor please, I will offer that now as Defendant's Exhibit D.

Mr. Moore: No objection.

The Court: Very well. So ordered.

(The mold referred to was marked as Defendant's Exhibit D, and was received in evidence.)

The Court: Please retire, ladies and gentlemen, and be here in the morning at 10:00 o'clock.

(Whereupon the jury retired from the court room, and the following proceedings were had outside the hearing and presence of the jury.)

The Court: Gentlemen, I received these requested instructions, but apparently neither of you have complied with Rule 14 of the Court. You had better read that rule and submit your objections in writing, if you have any. We have, for the purpose of simplifying the matter, numbered these pages so that you could refer to them. We have numbered both of them consecutively. I believe there are thirty-three requested instructions on behalf of the plaintiff, and ten [138] reqeuested instructions on behalf of the defendant. I would like to have those objections so that we will have them seasonably in the morning before 10:00 o'clock.

Mr. Wheeler: Yes, your Honor. And at this time I wish to apologize for being late this morning. It was entirely unintentional and was a matter over which I didn't have any control.

The Court: With the transportation difficulties some of those things are excusable at this time, but try to be here in the morning at 10:00 o'clock.

Mr. Wheeler: Certainly.

(Whereupon, at 4:30 o'clock p. m., May 8, 1946, an adjournment was taken until 10:00 o'clock a. m., May 9, 1946.) [139]

Los Angeles, California, Thursday, May 9, 1946. 10:00 A. M.

The Court: All present. Proceed.

FRANK OWEN,

called as a witness on behalf of the defendant, having been previously sworn, resumed the stand and testified as follows:

Mr. Moore: Your Honor please, I believe we were to start the cross examination of Mr. Owen?

The Court: Yes, sir.

Mr. Wheeler: Before you start your cross examination, I would like to ask one or two questions that I overlooked.

Mr. Moore: No objection.

Direct Examination (continued)

By Mr. Wheeler:

Q. Mr. Owen, when you removed these molds from Mr. Hartley's ears, did you do anything to them at all prior to the time that you sent them to the Clark Laboratories? A. Nothing whatever.

Q. In other words, they were in the same condition when you sent them to the Clark Laboratories that they were when you removed them from Mr. Hartley's ear?

A. Exactly.

Q. That was true as to the cotton, was it?

A. I beg your pardon?

Q. Did you remove the cotton? [141] A. No.

Q. Now, if you will examine Defendant's Exhibits B and C, I will ask you if these are in the same condition as they were when you sent them to the Clark Laboratories?

A. No; no, they are not in the same condition now.

(Testimony of Frank Owen)

Q. What differences are there?

A. Well, in the first place the cotton has been removed, and there is—the laboratory has waxed over that with a sort of a wax, I would call it.

Q. Will you hold them up and indicate where the wax has been applied?

A. The cotton protruded from the end of the ear mold at that point there (indicating).

Q. Indicating the prong that went into the auditory canal?

A. Yes, that part right there, as it was in the mold made yesterday. The cotton has been removed. By the way, we were instructed by the Clark Laboratories—

The Court: No just answer the question.

The Witness: The cotton has been removed, and this is waxed over. I can't tell you just why that is done, but that is done always.

Q. By Mr. Wheeler: And is there anything else that has been done, or any other change that you notice in the mold?

A. The only other change is that the laboratory has [142] sliced off the portion of the mold that they don't wish to use.

Q. That is the portion— A. The outer portion.

Q. The outer portion of the outer ear?

A. That's right.

Q. What can you state as to the length of the prong that went into the auditory canal on Defendant's Exhibit

(Testimony of Frank Owen)

C, which I think is the one which was removed from the left ear?

A. Well, it is just the average length, I should say. They may vary considerably, the length of a prong, as you call it, but this is the average, I would say.

Q. And what determines the length of the prong?

A. Well, the depth which you place—the depth of the cotton. If you put the cotton deep in, why, it would make a little longer prong.

Q. Does the length of that prong appear to be the same as it was when you sent it to the Clark Laboratories?

A. With the exception of the wax that is put over the end, I would say it is the same.

Q. Have you ever made a prong which would be two-thirds of an inch long?

A. Two-thirds of an inch?

Q. Yes.

A. Well, that would be a rather long prong, though it could be done, I think. [143]

Q. Have you ever?

A. I do not believe I have.

Q. Would you have taken particular notice of it if you had? A. Yes, I think so. Yes, I would have.

Q. Can you state as to whether the prong on the mold that you removed from the left ear of Mr. Hartley was two-thirds of an inch long?

A. No, it could not have been two-thirds of an inch long.

Q. Now, Mr. Owen,—

Mr. Moore: I object to that answer as not responsive. He said "it could not have been." He did not answer whether it was.

(Testimony of Frank Owen)

The Court: He said, "No," and then added something. The last part of the answer will go out. The first part will stand, the negative answer.

Q. By Mr. Wheeler: In removing the mold from Mr. Hartley's left ear, did you break off the prong or any part of the prong?

A. No, I am sure I did not, because if I had I would have put two pieces in the package for the laboratory. As it was, the two ear molds lay on the tray, and they were—one was right, one was left, a pair, the first pair that I had ever made, and there they were, and when Mr. Hartley first [144] arose and said, "Didn't you leave some cotton in my ear?" I pointed to the earpieces again, and I looked at them again and said, "No, there is the cotton there."

Mr. Moore: Now, pardon me, please. I would like to make an objection and ask that the last portion of his statement be stricken, after the word "No," the following part of the answer to the question, as to whether he broke it off, as a conclusion of the witness.

Mr. Wheeler: I think, if your Honor please, he was merely amplifying his statement; I mean his certainty as to the fact that he did not break it off.

The Court: Gentlemen, I do not want you to argue objections or motions before the jury. Read the answer, please.

(The answer was read.)

The Court: Motion denied.

Mr. Wheeler: I have no further questions.

(Testimony of Frank Owen)

Cross-Examination

By Mr. Moore:

Q. Mr. Owen, you have stated on direct examination that you didn't recall why Mr. Hartley came to your department. Isn't it a fact that when he first came to your department and talked to you, he asked for batteries?

A. It may be. I am not sure about that. I don't know just the facts regarding his first visit.

Q. Now, adverting to the operation which you demonstrated [145] to the jury on Mr. McKenna, how do you determine the amount of cotton which you will need in a particular ear?

A. Well, when you look at the ear you can fairly well determine that. You can take a little quantity and decide you didn't need as much cotton, and then find you needed more, and in that event you take another piece, and you would cast the other aside.

Q. This is placed in what portion of the ear?

A. In the auditory canal.

Q. Calling your attention to the diagram which is hanging on the board, is this portion between what appears to be hairs in the ear and the eardrum the auditory canal that you refer to?

A. As I understand, that is the auditory canal, yes.

Q. How do you determine whether the auditory canal is filled with cotton?

A. Well, you can see the cotton. You can see the cotton in the auditory canal and, of course, you don't let it go beyond the point of sight. If you did, it might be lost way deep in the auditory canal.

(Testimony of Frank Owen)

Q. In putting cotton in the auditory canal, do you take any method or see that it goes down to the eardrum?

A. Oh, no, it never reaches the eardrum. I mean to say that—you asked me if I take a method. Pardon me. No, there is no method, but you simply pack it just a sufficient [146] depth so as to prevent the plaster from going in.

Q. Is this a tight pack or a loose pack of cotton?

A. Rather a firm pack.

Q. Now, what would be the effect of not having any cotton in the auditory canal, with respect to the putting in of the plaster?

A. Well, quite likely—quite likely, if you poured the plaster right in, it would clog up, and it would not reach the drum of the ear—

Q. What would prevent it?

A. As I say, it would clog up and the air back of the plaster would prevent it from going farther down.

Q. If you had a very loose pack of cotton rather than a tight pack, what would be the effect of pouring the plaster in?

A. I wouldn't think any plaster could escape.

Q. Do you know, of your own knowledge, whether it would or not?

A. No, I couldn't say that. I never had the experience of it doing so.

Q. Do you always clip the hairs in the ear of any person for whom you are making the mold?

A. Wherever the hairs are coarse and heavy hairs, they are clipped off or you will have pain in extracting the piece.

(Testimony of Frank Owen)

Q. But there are occasions in which you do not? [147]

A. Oh, yes, there are occasions.

Q. Now, in October, 1945, how did you estimate the amount of plaster that was needed for a particular mold?

A. Well, you don't estimate any—you almost take the same amount of plaster, and if you have any over, you simply throw it away. There is nothing to that.

Q. How did you determine the amount of water to use?

A. That is a matter of judgment. You don't want to get it too thin or too thick.

Q. In fact, the consistency of your material for molds varies from time to time?

A. Not a great deal. There is plenty of latitude there.

Q. Depending upon the consistency as to whether it is thin or thick, is there any difference in the drying properties?

A. It would dry a little faster when it is a little thicker.

Q. How about the uniformity of drying throughout the mold? A. I think it dries uniformly, the same.

Q. You think it would dry with the same speed at the bottom of the mold as it would in the part that is at the top of the ear?

A. I think so; just the same as if it was a thinner mix. [148]

Q. Have you ever made any experiments to determine whether that is true or not? A. No, I haven't.

Q. Do you use sterile instruments, such as your tweezers and spatulas, in connection with your work?

A. Yes.

(Testimony of Frank Owen)

Q. What do you do to sterilize them?

A. Dip them in a solution.

Q. What sort of a solution?

A. We have a solution we clean the ear with; the same solution.

Q. Is that what you said was a sort of a mouth wash?

A. Yes.

Q. Now, you indicated the use of a spatula to get out the air bubbles from your mold. Do you push at all with that spatula? What motion do you use in using the spatula?

A. Well, you first pour the plaster in, and then you work the plaster down into the cotton, against the cotton, so that you have no bubbles in the ear mold.

Q. Now, in using your operation of pushing the flesh away from the mold when you are removing it, might that not cause a portion of the plaster mold to break off? A. Break off where?

Q. Break off of the mold.

A. Occasionally around the edge of the mold, where it [149] is very thin, it would break off, if that is what you refer to.

Q. How about that prong that you have referred to? Could it not break off the prong?

A. That could break off the prong in that case, but if it did we would all know it, and then you would have a job to do. You would have to recover the piece of plaster that is left in the ear.

Q. Does the cotton always come out with the mold?

A. Not every time. I had just one occasion in which it did not come out.

(Testimony of Frank Owen)

Q. You mean out of the 150 molds you made only one time it did not come out?

A. I don't recall of any other time. I don't recall of any other, and then, as I say, you have a job to do. You have to recover the cotton, and if you don't recover it, and if the individual can't recover it, then there is a job for a physician or a surgeon.

Q. Now, referring to the making of a mold for Mr. Hartley, do you recall at this time how much cotton you used in connection with the operation on him?

A. No, I do not.

Q. Do you recall now whether or not you clipped the hair in his ear, either in his right or left ear?

A. I am not sure about that.

Q. Do you recall at this time whether you swabbed his [150] ear with oil, either one of the ears, or both?

A. Yes. That question is as I have answered you the other day.

Q. When you say "the other day", you refer to your deposition— A. Yes.

Q. —which was taken in Mr. Wheeler's office?

A. Yes. I believe my answer was that to say that you turned right or left, or whether you did this or not, I can't be positive, but it must have been done or I would have had difficulty in removing the earpiece, it would stick in the ear.

Q. Do you recall now whether the mold in Mr. Hartley's right ear stuck to the ear? A. No, it did not.

Q. You recall it?

A. I am sure it didn't. It came out easily. He did not complain of any pain. If it had stuck, there would have been pain and a little trouble.

(Testimony of Frank Owen)

Q. What about the left ear?

A. The same thing.

Q. You mean he did not complain of any pain?

A. No, no pain. As soon as he arose from the chair, he said, "Didn't you leave some cotton in my ear?" And I pointed to the cotton on the ear molds. [151]

Q. Do you recall at this time any of the individual moves that you made with respect to either the right mold or left mold of Mr. Hartley's ears?

A. No; no, I don't.

Q. In other words, in telling us what you did, isn't it a fact that you are basing it upon what your usual methods are rather than upon a specific recollection in that case?

A. Yes. I will say it is, out of 100 ear molds how many of them could you say that I just did exactly this in any particular one? I couldn't say definitely. But I certainly had the wax in there—I mean the oil in there, or else I could not have removed the mold.

Q. Do you recall how long it took for the mold to set in his right ear? A. No, I do not.

Q. Is the same thing true with the left ear?

A. Yes.

Q. Now, when Mr. Hartley said to you, "Isn't there some cotton in my ear?" did he indicate which ear he was referring to?

A. Well, he referred to the left ear, because that was the last mold we took, and that is when he made the remark.

Q. But he didn't specify the left ear?

A. No, but I pointed to both earpieces, ear molds, and there was the cotton on the end of both of them. [152]

(Testimony of Frank Owen)

Q. Where were the ear molds lying?

A. Lying on a tray on the desk.

Q. The same desk on which he had laid his head?

A. Yes.

Q. Where was Mr. Hartley standing when you pointed out these ear molds?

A. He had just risen from the desk, you might say, where he had his head laid on the pillow, and stood up and made that remark.

Q. Do you know whether he looked at the ear molds or not at that time?

A. I don't know whether he gave special attention to that; I couldn't say that; but his remark caused me to make that statement, and he surely—I imagine he did.

Q. Which statement do you refer to?

A. "Didn't you leave some cotton in my ear?"

Q. But you made a reply?

A. "No, there it is on the ear molds."

Q. In other words, you made a gesture to the table?

A. Yes, and made the remark that there it is.

Q. Now, did you leave Mr. Hartley to wait on any customers at any time while he was having these molds made?

A. I don't recall that I did.

Q. Did you leave Mr. Hartley for any purpose during that time, that you recall? [153]

A. I probably left to empty the surplus plaster from the cup.

Q. Do you recall doing so?

A. I do not recall doing so.

Q. Do you recall having any telephone calls during the period that you were making the molds?

(Testimony of Frank Owen)

A. I am not sure about that.

Q. You may have had some telephone calls?

A. I may have had, yes. That occurs very seldom.

Q. Now, you have indicated that the store on Saturday night during the month of October, 1945, closed at 9:30. Do you recall on the night of October 13, 1945, what time the Hartleys left? A. No, I do not.

Q. Left your office? A. I do not recall that.

Q. Do you recall on that night whether you made any more molds before closing time?

A. No, I didn't after Mr. Hartley's.

Q. Do you recall whether you waited on any other customers?

A. I think there was a customer or two after that bought some batteries.

Q. Isn't it a fact that you said to Mr. Hartley, in the presence of Mrs. Hartley, or words to this effect, that [154] "You had better hurry up, the lights will be out shortly," or "They will be turning out the lights"?

A. I may have made the remark that we didn't have any time to waste, but still—it turned out that there was lots of time after that, in spite of that statement, if I made it. I may have made it.

Q. Don't you have a clean-up period between 9:00 o'clock and 9:30, or at least did at that time, where your customers were leaving the store and you straightened up your stock, and things of that kind?

A. No, not between 9:00 and 9:30. Your clean-up, if any at all, is after 9:30. You do business until 9:30.

Q. Now, you have stated in response to Mr. Wheeler's questions that the prong on Defendant's Exhibit C is the average size. That is correct, isn't it?

(Testimony of Frank Owen)

A. Those are the average of what I make, yes.

Q. The prong on Defendant's Exhibit C could have been longer than that which exists there and broken off, could it not? A. Could have been longer?

Q. Yes.

A. I would say the prong on either one of them could have been longer; could have been, but it doesn't —there is nothing to show that.

Q. Do you know whether it was or not, of your own [155] knowledge? A. No, I do not, no.

Q. Now, you have indicated, in response to one of Mr. Wheeler's questions, that the cotton had been removed from Defendant's Exhibits B and C. That was a conjecture on your part, was it not? That is, you don't know who removed it, or when, do you?

A. Well. I know that I mailed it to the laboratory with the cotton on.

Q. You personally examined both of them, did you?

A. Yes.

Mr. Moore: No further questions.

Redirect Examination

By Mr. Wheeler:

Q. Mr. Owen, in fitting the ear molds, or making the ear molds in connection with Mr. Hartley's ears, did you act in any greater haste, or did you act any more quickly in making those molds than you did any other molds?

A. No, not any more than usual. I had plenty of time for that.

Mr. Wheeler: I have no further questions. That is all.

Mr. Goodrich, will you be sworn, please? [156]

J. W. GOODRICH,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: J. W. Goodrich.

By Mr. Wheeler:

Q. Mr. Goodrich, you are a resident of Los Angeles, are you? A. Yes, sir.

Q. What is your employment?

A. I am the manager of Clark Laboratories.

Q. Clark Laboratories makes these earpieces, does it?

A. Yes, we reproduce the earpiece from the impressions of the ear sent in by the agent.

Q. What volume, or how many earpieces do you make or reproduce in a day?

A. Well, it varies from day to day. It might possibly reach as high as 150, and possibly go as low as 20.

Q. For what area, or from what area do you receive molds for reproduction into earpieces?

A. Well, we get them from Japan, China, and Australia and most parts of the United States and Canada, and a few in Mexico.

Q. Is there any other company that does similar work—[157] A. Yes.

Q. —in western United States?

A. No, not in western—

Q. Where is the nearest corresponding company?

A. Chicago; although we do have a branch in San Francisco.

(Testimony of J. W. Goodrich)

Q. This is your main office, however?

A. That's right.

Q. How long have you been manager of this company? A. Approximately 10 years.

Q. Here in Los Angeles? A. Yes, sir.

Q. Is the work of making earpieces from the molds performed under your direct supervision and care?

A. Yes, sir.

Q. How many people do you employ?

A. Well, right at the moment we have eight in this office.

Q. Now, Mr. Goodrich, will you describe, briefly, what you do when you receive an ear mold, what you do in making an earpiece?

A. When the package comes in, it is put on the receiving bench and opened by—well, there are two to three people that are able to open them, and record them, and anything that may look a little bit out of order in the mold, it is brought [158] to my attention. If it isn't, if it is the regular run of impression, why, it goes through without my O. K.

Q. After the package is opened and the ear molds are removed from the package, what happens?

A. Well, it is numbered. It is numbered with the number of that particular agent that sends it in, so that we can return it.

Q. Referring to Defendant's Exhibits B and C, which I think are before you on the desk, I will ask

(Testimony of J. W. Goodrich)

you if you will examine them and tell us what those numbers are that appear on there.

A. It is ZZ 405-K and KZ 404-K, then "DH", which indicated a double-header, or two molds, and the "K" indicates a small receiver.

Q. When you say a small receiver, you mean a small Zenith type receiver? A. Yes.

Q. That has nothing to do with the amplifier which is worn, but it is the earpiece? A. That's right.

Q. It is the little button type receiver that fits into the earpiece? A. That's right.

Q. And Zenith has a small type receiver?

A. Yes. [159]

Q. Now, have you examined your records to determine the name of the person for whom those molds were made? A. Yes.

Q. And for whom were they made?

A. They were made for this fellow Hartley.

Q. That is Fred Hartley? A. Yes.

Q. Now, after the molds are numbered, what happens to them?

A. Then they are reduced in size, and the surplus taken off, and made as near like the finished product as we want them, and then reproduced and impressed, of course, and finished into the finished article.

Q. When you say the surplus is removed, will you just hold that up and show what is actually done?

A. Well, this back is cut off of here, and then it is brought down to the size of the receiver that we might want to use on it.

(Testimony of J. W. Goodrich)

Q. What, if anything, else is done to the mold?

A. Well, it is processed by dipping it in a wax solution, and then all the bubbles, or if there should be any bubbles or any imperfections that we think are not in the ear, they are changed on the cast so that it reproduces as near the ear as possible.

Q. So that these ear molds are examined for the [160] presence of air bubbles? A. That's right.

Q. Or other roughened surfaces?

A. That's right.

Q. And those surfaces are covered with wax?

A. Yes.

Q. Now, does it appear that those molds have been so covered? A. Yes.

Q. And treated? A. Yes.

Q. Will you take Defendant's Exhibit B and indicate where wax has been applied?

A. Wax has been applied on the tip. There is a small air bubble on the top part, and then it has been expanded on the edge, on the fitting edge, and also along here there is a little air bubble that has been filled.

Q. Now, will you examine Defendant's Exhibit C and indicate where wax has been applied?

A. Wax has been applied on the canal part of the ear, as well as on the back; that is, on the bottom surface to raise it in order to make it conform and match the other one, and also there was a small bubble underneath the canal part, and also a small bubble on the back, and also the enlarging on the fitting edge. [161]

Q. Now, when you say that wax has been applied on the canal portion, you are referring to what? I have

(Testimony of J. W. Goodrich)

referred to it as the prong that goes into the auditory canal. A. Yes, that's right.

Q. And the tip has been covered with wax?

A. Yes.

Q. What is the purpose of putting the wax on the tip?

A. Well, the purpose of that is, when we take the cotton from the tip it leaves a very rough surface, and when we apply the reverse or the matrix, it will not pull loose and will not break it, so we have to put the wax on it to get it to release easily and not break the mold or the cast. Then, also, it will give us a smooth impression.

Q. The instrument, the finished instrument, must be smooth so that it will not irritate the ear?

A. That's right.

Q. Now, you use this pink type of wax. You recognize it, do you?

A. Yes, that is pink wax.

Q. After that is done, what do you do?

A. Then it is reversed; that is, we call it reversed, and there is a matrix made, and then that is put into a flask, and it is pressed in plastic material.

Q. What do you mean by a matrix?

A. The matrix is the reverse of it, the female of this [162] part. In other words, this is turned out, and it is made like the ear, so we can press the plastic into it.

Q. What material is made—from what material is this matrix made?

A. Dental stone, artificial stone.

(Testimony of J. W. Goodrich)

Q. So that you have your master of artificial stone, and you press the ear mold, as you have treated it, into the matrix, or into this material?

A. It isn't just like that, no. The matrix is made in about four or five parts. You couldn't make it all in one part because you could not get it loose from the mold. It would not pull. So we have to make it in four or five parts and take it off in pieces and put it back together when we take this mold out.

Q. I see. But when you have completed the matrix, you have an exact opposite of the ear mold?

A. That's right.

Q. Then when you assemble the matrix, you pour in the plastic material which makes the earpiece?

A. That's right.

Q. Now, will you examine Defendant's Exhibit C, which I think is the mold from the left ear.

A. Yes, that's the left.

Q. Will you remove the wax from the tip of the prong that goes into the auditory canal? [163]

The Court: Have you done so?

The Witness: Yes.

Mr. Wheeler: Counsel, would you like to see it?

Mr. Moore: Yes.

The Court: Show it to the jury.

(The article was passed to the jury.)

The Court: The record shows that all of the jurors have inspected and have had an opportunity to examine the exhibit. Proceed.

Q. By Mr. Wheeler: What can you state as to the surface?

A. I would say that is a rough surface.

(Testimony of J. W. Goodrich)

Q. Can you state as to whether there is any indication of cotton having been against that surface?

A. Yes, there would be.

Mr. Moore: Objected to, your Honor, as not responsive.

The Court: Probably not. You didn't directly answer that question.

The Witness: I am sorry.

The Court: Strike the answer. Read the question again, please.

(The question was read.)

The Court: That can be answered "Yes" or "No."

The Witness: Do you want me to explain that answer?

The Court: No, just answer it first.

The Witness: Yes. Yes, there is an indication. [164]

Q. By Mr. Wheeler: What is the indication?

A. Well, if there was—if there hadn't been cotton there, in the first place it wouldn't have been a full-sized canal, which is indicated. Another thing, instead of having a rough surface, you would have a very smooth surface, indicating an air bubble.

Q. From an examination of that surface, can you tell as to whether it has been broken?

A. I wouldn't say it had been broken, no.

Q. In other words, your statement is that it has not been broken? A. Yes.

Q. What do you mean when you say that there is evidence of a full canal there?

A. Well, it seems to indicate to me if there was evidence of a short canal, you would have, about all the way from a third to two-thirds air bubble, leaving a

(Testimony of J. W. Goodrich)

smooth surface, and you wouldn't have a complete rough surface, as you have there.

Q. Do you have any recollection, Mr. Goodrich, as to whether these particular earpieces were brought to your attention— A. No, I don't.

Q. —while they were in the laboratory?

A. No, I don't have any recollection. [165]

Q. Would your records indicate it if they had been?

A. Once in a while we do indicate it by putting it on the card, as we have our index, as a bad cast. But this has not been indicated that way on the card, so that evidently at the time they were received they were in the ordinary condition we receive them in.

Q. And they were adequate for the purpose of making the earpiece? A. Yes.

Q. Now, if you will examine Defendant's Exhibit A, which I think is this piece here, will you identify that?

A. Yes. That belongs to the left ear.

Q. Can you tell whether it was made from one of the molds?

A. Yes, it was made from the left ear mold.

Q. Which is Defendant's Exhibit— A. C.

Q. —C. That transparent material is the plastic that you use in making the mold?

A. Yes, that is a reproduction of it.

Q. Now, after the earpiece is made from the matrix, what do you do then to the earpiece?

A. It is polished and numbered to correspond with the mold. The mold and the piece that is being worked on, after it has been prepared, it is polished and cleaned

(Testimony of J. W. Goodrich)

up, and the [166] two pieces are kept together until they are shipped. Then they are put in the same box.

Q. You drill the hole in the earpiece,— A. Yes.

Q. —so that the earphone will fit into it?

A. Yes.

Q. And drill a hole into the prong, as I have referred to it, that fits into the auditory canal? A. Yes.

Q. What is the purpose of that hole in the prong of the earpiece?

A. It is to carry the sound directly into the canal.

Q. That is the air conduction? A. Yes.

Q. The method by which the air waves are transmitted? A. Yes.

Mr. Wheeler: I have no further questions. You may examine.

Cross-Examination

By Mr. Moore:

Q. Mr. Goodrich, how long has Sears, Roebuck been a customer of your laboratory with respect to earpieces?

A. Why, I can't answer that absolutely because I don't recall the date since they have been sending them in.

Q. Was it sometime after you became manager at the [167] laboratory that they started? A. Oh, yes.

Q. What volume of earpieces do you make for them?

A. Well, that is something I would have to check the records for, to be sure.

Q. Approximately. A. I wouldn't know.

Q. Are there several daily?

A. Well, some days; some days not. It is almost an impossibility to say.

(Testimony of J. W. Goodrich)

Q. Are you able to state what proportion of your business comes from Sears? A. No.

Q. Can you estimate it as large or small?

A. No, I couldn't.

Q. But you do a substantial amount for them, do you not? A. Yes.

Q. Now, did you personally have anything to do with the making of the earpiece in Mr. Hartley's case?

A. Yes.

Q. What did you have to do?

A. On the finishing I drill the holes, and I also grind the—it is pretty hard to put that into words—well, finish it up to the extent of grinding off the burrs after they come out of the mold. [168]

Q. Did you have anything to do with the making of the matrix of Mr. Hartley's earpieces? A. No.

Q. Did you see either of the molds, Defendant's Exhibits B and C, prior to today?

A. I don't understand the question.

Q. Will you read it, please?

(The question was read.)

A. Yes.

Q. When did you first see them?

A. At the time that I polished them or was working on them in my—

Q. You didn't receive them or take them out of the box, did you? A. No.

Q. Was there a record made of the receipt of these molds from Sears? A. Yes.

Q. Immediately upon their receipt? A. Yes.

Q. Did you make that record? A. No.

(Testimony of J. W. Goodrich)

Q. Do you know who did?

A. I can only know that by the writing on the index card. I don't have the card with me. [169]

Q. You don't have the index card with you?

A. No, I don't.

Q. When did you last examine that index card?

A. I couldn't say.

Q. Within the last few days?

A. Yes, I did. I checked the numbers on the molds, I think a couple of days ago, approximately.

Q. Did you check the index card for anything except the serial numbers? A. Yes.

Q. What did you check it for?

A. The name and the date.

Q. Anything else?

A. And whatever might be as an indication of a bad cast or a good cast.

Q. Would you say that when the index card is made that in every instance an indication would be made of a bad cast? A. Yes.

Q. Now, you have indicated you had no recollection of having this particular mold called to your attention. Could it have been called to your attention and you not recall it? A. Yes, possibly.

Q. Now, it is not quite clear to me as to this matter of the air bubble and the rough edge of the prong. Is it not possible to have a break of the prong leave a rough [170] surface? A. Yes, that's true.

(Testimony of J. W. Goodrich)

Q. What did you mean by the air bubble? Will you explain that, please?

A. Well, the air bubble—in mixing plaster there is a certain amount of air that is gathered there, you might say, but in putting it into anything, if you put it in a closed surface, you might trap air below so that the air could not get away, and there is an air bubble.

Q. Now, in explaining why the roughened edge of Defendant's Exhibit C, that is, the prong on Defendant's Exhibit C indicated the presence of cotton to you, did I understand you to base that upon the fact that there wasn't an indication of an air bubble? A. Yes.

Q. But it is true, is it not, that there could be a third possibility, namely, that a piece had broken off the prong, leaving a rough surface? A. It could be.

Q. And can you tell from your examination of the Defendant's Exhibit C which of the two possible conditions that is causing a rough edge was present, the presence of cotton or the breaking off of a prong.

A. Well, from this light that I have here, I would say that it was against the cotton. [171]

Q. What causes you to say that?

A. Well, from the indication of the surface, the roughened surface.

Q. Could the surface which you observe on the prong on Defendant's Exhibit C have been created by a break?

A. Yes.

Mr. Moore: No further questions.

(Testimony of J. W. Goodrich)

Redirect Examination

By Mr. Wheeler:

Q. With reference to the examination of the record card or index card that you made, Mr. Goodrich, you examined that in my presence several days ago?

A. Yes. I don't recall what day it was. That's why I am not sure of it, but I did check the serial number against the name and found that they were for that certain party.

Q. Yes. Now, did your examination of the index card show anything other than the name of the man and the serial number? A. Only the date.

Q. And the date? A. Yes.

Q. In other words, there wasn't any evidence on the card of an imperfect cast? A. No. [172]

Q. Or any notation? A. No.

Q. From your examination of the surface of this prong in Defendant's Exhibit C, in your opinion which is more probable, the breaking of the plaster or the presence of cotton?

A. I would say the presence of cotton.

Mr. Wheeler: I have no further questions.

Mr. Moore: No further questions.

The Court: Step down.

Mr. Wheeler: You are excused.

The Court: We will take our recess now, ladies and gentlemen, for five or ten minutes. Remember the admonition, and occupy the jury room.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Wheeler: Dr. Brown.

DR. GEORGE W. BROWN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: George W. Brown.

Mr. Moore: If your Honor please, before counsel examines Dr. Brown, I believe the record will show that in asking your [173] Honor to interrogate the jury the doctor was referred to as Dr. George Moore rather than Dr. George Brown. I imagine the question of the jury would be the same, as to whether they knew them.

The Court: Is that true?

Mr. Moore: Yes.

The Court: You should have called the court's attention to it at the time, if that is true. I am not going to interrogate the jury again.

Q. By Mr. Wheeler: Dr. Brown, you are licensed to practice medicine in the State of California?

A. Yes, sir.

(Testimony of Dr. George W. Brown)

Q. Will you state, briefly, your medical qualifications?

A. Well, as to my eye, ear, nose and throat specialty I attended Mayo Clinic, and the Chicago Eye, Ear, Nose and Throat College, and the New York Eye and Ear Infirmary, and the Illinois Eye and Ear Infirmary in Chicago, and I have been 15 years working at the General Hospital in eye, ear, nose and throat; also, I was professor of eye, ear, nose and throat over at the College of Medical Evangelists, and I am on the staff of the Good Samaritan Hospital, and St. Vincent's and Hollywood.

Q. How long have you been specializing in eye, ear, nose and throat, Doctor? [174] A. Since 1915.

Q. In California? A. Yes, sir.

Q. Dr. Brown, did you make an examination of a Mr. Fred Hartley? A. Yes, I did.

Q. What was the purpose of your examination?

A. For testing his left ear for hearing.

Q. When did you make that examination?

A. I believe it was on April the 9th. Anyway, that was when the report was written.

Q. Will you state what your examination consisted of?

A. Well, I took him in my ear room, and I took an electric light and an ear speculum and I looked into the ear, the canal of the ear, and examined the eardrum of the left ear, and the eardrum was normal. That is, there were no scars or any perforations. There was no discharge from his ear. And then I examined his other ear, and found it to be identical. There was a slight retraction of both eardrums as the superior portion of the drum.

(Testimony of Dr. George W. Brown)

Then I tested his ears for hearing with a tuning fork, a C-212 fork. He heard that in his left ear—he heard it by air five seconds by holding the fork up here (indicating) and then right back over the auditory nerve, the nerve of hearing, and he heard it in 25 seconds there. [175]

The Court: Is that the left or the right ear, Doctor?

The Witness: The left ear.

The Court: You are pointing to your right ear?

The Witness: Oh, yes. Pardon me. And the low tone fork, which vibrates 64 times per second, he didn't hear that at all. Then I took a kind of whisper, and he could not hear the whisper at any distance; and an ordinary conversation, about like I am talking now, he could hear it at one foot, and that was the same in his right ear. He heard practically the same in each ear.

Then I took an audiogram of it, and the audiogram showed that he was totally deaf in both ears, and there wasn't five decibels difference in the right ear and the left ear. And that was way down at 22,048 vibrations per second.

So I didn't see anything wrong with his ear from any injury, and according to the tuning fork tests he has catarrhal deafness or oto-otitis media, and that is generally caused from catching cold in the Eustachian tube, which you can see over there, which lets air up to the middle ear.

Now, there are 15 pounds of pressure on everything every place; there is 15 pounds to the square inch. This is why you don't hear. The 15 pounds per square inch is pressing on the tympanic membrane, and every time

(Testimony of Dr. George W. Brown)

you swallow you feel your ears click and that is when air goes to the Eustachian tube and goes to the middle ear; but if this Eustachian tube [176] is closed from a catarrhal condition due to sore throat and frequent colds, then this atmospheric pressure of 15 pounds to the square inch is on the eardrum externally and cannot go in internally to counterbalance the external pressure. Therefore, the eardrum is gradually retracted in, and if it is retracted in, it becomes more or less wrinkled and thickened and doesn't vibrate, and doesn't carry the sound waves to the little ossicles in the ear. So you can imagine that, for example, by taking a snare drum and if it is not in the best of condition and is all wrinkled up, then if you hit it it wouldn't make much sound. So that is what I found wrong with this gentleman, was a catarrhal deafness.

Q. Now, in your discussion of his deafness with Mr. Hartley, did he state as to the period of time which he had been deaf?

A. He told me he had been deaf about 15 years.

Q. As a part of your investigation in this matter, did you discuss this case with Dr. Ghrist?

A. I did. After I examined this man I called up Dr. Ghrist and told him I had one of his cases over here for examination, and I told him I didn't see anything—didn't see any injury as a result of any accident, and then he told me of the condition.

Mr. Moore: If your Honor please, I am going to object to any conversation between Dr. Brown and Dr. Ghrist. [177]

The Court: Sustained. I don't believe there was any foundation laid when Dr. Ghrist was on the stand.

(Testimony of Dr. George W. Brown)

Mr. Wheeler: No, your Honor.

Q. By Mr. Wheeler: But as a part of your investigation in this matter, you did discuss it with Dr. Ghrist?

A. I did.

Q. After your discussion with Dr. Ghrist, did you make any further investigation or study of Mr. Hartley's ears?

A. That was—I had already examined Mr. Hartley's ears at that time.

Q. But after your conversation with Dr. Ghrist, you didn't make any further investigation?

A. Oh, yes, I spoke to him. We have a postgraduate course or Mid-winter Convention which continues for two weeks every year, and I told him about it, and he said—

Mr. Moore: Your Honor please—

The Court: Yes.

The Witness: He said—

The Court: No, Doctor.

The Witness: Oh, pardon me.

Q. By Mr. Wheeler: I didn't mean to get any conversation that you had with Dr. Ghrist, but my question was as to whether you made any further examination of Mr. Hartley's ears after your conversation with Dr. Ghrist. A. No, sir; no. [178]

Q. You have indicated, but I want it clear for the record, Doctor, in your opinion, has Mr. Hartley suffered any impairment in the hearing of his left ear as the result of any accident or presence of foreign matter that may have been in his ear on or about October 13, 1945?

(Testimony of Dr. George W. Brown)

Mr. Moore: Your Honor please, I object to that question on the ground no foundation has been laid.

The Court: I think the question is a little too broad. If you are referring to trauma, that is one thing. If you are referring to other matters, there is no hypothesis for the doctor to be permitted to answer that question. Sustained.

Q. By Mr. Wheeler: Did Mr. Hartley—or, what conversation did you have with Mr. Hartley with reference to any accident that may have occurred to him on or about October 13, 1945?

A. Well, he gave me the history. I will read it to you. It says: October 13th the patient states that he was having an impression taken for his ear and a piece of plaster fell into his left ear. He has had impairment of hearing in the right ear for the past 15 years, but since this plaster got into his left ear the hearing has been impaired in that ear. He was under the care of Dr. Ghrist, and he said Dr. Ghrist removed it. It was quite painful at the time. I think he took a general anesthetic. But I didn't see any evidence [179] at this time of any plaster or any foreign body having been in his ear.

Q. Now, was there any evidence of any impairment of hearing as a result of the incident that Mr. Hartley has related? A. No, sir.

Mr. Wheeler: That is all.

Mr. Moore: No questions.

The Court: That is all.

Mr. Wheeler: Thank you, Doctor. I will call Mr. McKenna.

FELIX W. McKENNA,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination.

The Clerk: Will you state your name, please?

The Witness: Felix W. McKenna.

By Mr. Wheeler:

Q. Mr. McKenna, you are a resident of Los Angeles, are you? A. San Gabriel.

Q. You are employed by what company?

A. Sears, Roebuck & Co.

Q. How long have you been so employed?

A. Over two years. Two years, now. [180]

Q. In what capacity are you employed?

A. Supervisor of the hearing aid departments in the Los Angeles district.

Q. How long have you been employed in that capacity?

A. Since I have been employed with Sears, the past two years.

Q. Now, have you had any prior experience in the hearing aid business? A. Since January, 1937.

Q. Where did you have your first experience in the hearing aid field? A. Denver, Colorado.

Q. And what did you do at that time?

A. I sold hearing aids for a living.

Q. As a part of the sale of hearing aids, did you have any occasion to make impressions of ears?

A. Yes, sir.

Q. Or to make these ear molds? A. Yes, sir.

Q. How long were you in Denver?

A. In the business, I was there a little over two years.

(Testimony of Felix W. McKenna)

Q. Well, were you employed by any one, or were you in business for yourself?

A. The first part of that, the first year I was employed by another concern, and the rest of the time I was in my own [181] business.

Q. What type of hearing aids did you sell at that time?

A. Vacuum tube.

Q. Any particular type? A. R-X.

Q. When you left Denver, did you have any further experience in the hearing aid work?

A. Yes, I went to Detroit, Michigan.

Q. How long were you in Detroit?

A. I was there a little over four years.

Q. What did you do in Detroit?

A. I had my own business with the R-X, as distributor for the R-X hearing aid for the state of Michigan.

Q. That was your own business? A. Yes, sir.

Q. You had an exclusive license for the sale of those products— A. Yes, sir.

Q. —in Michigan? A. Yes, sir.

Q. Did you have any people working for you?

A. Yes, sir.

Q. How many people? A. Five.

Q. In connection with your business in Detroit, did you [182] have any occasion to make ear molds?

A. Yes, sir.

Q. After Detroit, where were you?

A. I came to Denver. Or, excuse me. I came to Los Angeles.

Q. Then what did you do in Los Angeles?

A. Well, I didn't do anything for a few months. Then I started working for Sears and opened these

(Testimony of Felix W. McKenna)

departments in the Los Angeles district for Sears, Roebuck & Co.

Q. What has been your experience in the making of ear molds? A. What has been my experience?

Q. Yes.

A. Well, in the course of that time I probably made, myself, 1500 to 2,000 ear impressions.

Q. And you have had occasion to examine impressions made by others, have you? A. Yes, sir.

Q. Calling your attention to October 15, 1945, Mr. McKenna, I will ask you if you saw Mr. Frank Owen on that day.

A. That was on Monday; yes, sir, Monday morning.

Q. Do you recall where you saw him?

A. In our booth, where we sell our hearing aids, sitting on a chair right next to his demonstration table.

Q. And this was in which store of Sears, Roebuck & Co.? [183] A. Olympic and Boyle.

Q. That is sometimes called the Olympic Street Store?

A. The Olympic Street Store, yes.

Q. Do you recall the time of day it was, Mr. McKenna?

A. Just as the store opened in the morning.

Q. What was the occasion of your visit?

A. A regular routine call.

Q. What was the purpose of your call?

A. To instruct them on anything that might come up that they would need instruction on. By my experience in the hearing aid business, why, that is the reason the Sears, Roebuck hired me, is for my qualifications in the hearing aid business. So I opened these departments, and it was my business to supervise each

(Testimony of Felix W. McKenna)

one of the departments and each one of the employees in the departments.

Q. How frequently would you make these visits to the various stores?

A. I got to every store always once a week, and many times twice and three times a week.

Q. How frequently did you have occasion to go into the Olympic Street Store?

A. More often than the other stores because I was close to my office.

Q. In other words, your office is in the same building—

A. Yes, sir. [184]

Q. —as the Olympic Street Store?

A. That's right.

Q. Or in the same building in which Mr. Owen sold hearing aids? A. That's right, sir.

Q. And you would see him more frequently than two or three times a week? A. Yes, sir.

Q. Now, calling your attention again to October 15th in the morning, Monday morning, did you observe any ear molds in Mr. Owen's office on that morning?

A. Yes, sir.

Q. What ear molds did you observe?

A. I observed two ear molds lying on the tray.

Q. Was there anything unusual about these two ear molds? A. No, sir.

Q. What did they appear to be?

A. They appeared to be a right and left ear mold impression.

(Testimony of Felix W. McKenna)

Q. For the same person?

A. I wouldn't know from the first glance. I wouldn't know exactly whether for the same person, but after discussing it, I did.

Q. Did Mr. Owen tell you that these were the impressions for Mr. Hartley? [185] A. Yes, sir.

Mr. Moore: If your Honor please, I object to any conversations between Mr. Owen and Mr. McKenna, and ask the last question and answer be stricken.

The Court: Yes. The question should have been objected to; res inter alios acta would apply. You will disregard that last answer, ladies and gentlemen. It will be stricken from the record and the objection is sustained, although it was too late.

Q. By Mr. Wheeler: Do you recall these two ear molds? A. Yes, sir.

Q. Did you make any particular examination of them?

A. Yes, sir.

Q. What examination did you make?

A. I observed them very closely. The molds were sitting there. Your Honor, may I show you how?

The Court: You had better just answer the questions, Mr. McKenna, and stop when you do answer them. You will save a lot of time if you do that.

The Witness: All right, sir. Will you repeat the question, please?

(The question was read.)

The Witness: A close eye examination.

Q. By Mr. Wheeler: Did you note the presence or absence of cotton on the ear molds? [186]

A. Yes, sir.

(Testimony of Felix W. McKenna)

Q. And what did you observe?

A. I observed a normal ear mold with cotton on both canals of the ear molds.

Q. Did you make any examination as to the length of the prong or portion of the ear mold that goes into the auditory canal?

Mr. Moore: Objected to as leading and suggestive. I haven't raised objections heretofore on that, but counsel has asked a number of questions that are leading and suggestive questions.

Mr. Wheeler: Well, I think—

The Court: No argument on an objection unless I ask for it, gentlemen. Sustained.

Q. By Mr. Wheeler: What other examination did you make of the ear molds?

A. I didn't pick the molds up in my hands because it wasn't necessary. There were—I was sitting right here, and the ear molds were right here, and the table was right here. I examined them right here, and it wasn't necessary to pick them up at all.

Q. What can you state as to the condition of the molds at the time of your examination?

A. They looked like very normal, excellent molds.

Q. What can you state as to the—well, that may be [187] the same question. Mr. McKenna, have you met Mr. Hartley before? A. Before? Yes.

Q. When did you meet him?

A. Out to his home.

Q. Do you recall the time?

A. In the evening, near in the neighborhood of six o'clock in the evening.

(Testimony of Felix W. McKenna)

Q. Do you recall the day of the month, and the month?

A. Well, sir, it was on Thursday or Friday, I believe.

Q. Do you recall what month? A. October.

Q. Did you have any conversation with Mr. Hartley with reference—

A. Excuse me. I saw Mr. Hartley before that. I saw Mr. Hartley out at his place of business, out where he works. That was on, I think it was Tuesday. No, I wasn't either. It was Wednesday, about Wednesday, I think it was, during the middle of the week.

Q. You had a conversation with him at that time?

A. Yes, sir.

Q. And you had a conversation with him at the time you saw him at his home? A. Yes, sir.

Q. Now, during that conversation was there any [188] discussion as to whether Mr. Hartley had the materials that had been removed from his ear?

Mr. Moore: Objected to, your Honor, as leading and suggestive.

The Court: That simply directs his attention to an incident, and he can answer it "Yes" or "No."

The Witness: Yes.

Q. By Mr. Wheeler: What was that conversation?

A. He said that he had—he told me his experience. He said that he had had some plaster in his ear, and said he went over to Dr. Ghrist on Monday of that week, and couldn't have it removed, so the doctor asked him to come back the next day, and gave him the anesthesia, and told me he was on the table quite a long time, and he was there all night, and he said when he got up in the morning he still thought it was night, and he said he was going to get up and get his supper and

(Testimony of Felix W. McKenna)

the nurse told him, or, asked him, "Do you know what day it is?" He said, "No," and he said, "I want to get my supper." She said, "No, this is morning." I remember that part of the conversation.

Q. I will ask you if you had any conversation with reference to whether Mr. Hartley had the portions of the plaster that had been removed from his ear.

A. Yes.

Q. What was that conversation? [189]

A. He said the doctor had them, had the portions of the plaster that he removed from his ear.

Mr. Wheeler: I have no further questions.

Cross-Examination

By Mr. Moore:

Q. Do I understand that the conversation at the place of business there took place on the Wednesday following the sale of the aids on the previous Saturday, the previous Saturday being October 13, 1945?

A. Yes, sir, I think it was.

Q. At what time of the day was it?

A. Early in the morning.

Q. When did Hartley tell you he had been in the hospital? A. That morning.

Q. That same morning?

A. It was the morning that I saw Mr. Hartley.

Q. And he told you that he had been in the hospital that same morning?

A. I may be wrong in my days there, see. I may be wrong in my days, but it was after Mr. Hartley had been in the hospital.

Mr. Moore: No further questions.

Mr. Wheeler: I have no further questions. I have no further witnesses, your Honor. [190]

Mr. Moore: No rebuttal, your Honor.

The Court: It is about twenty minutes of twelve, gentlemen. I think probably we could excuse the jury. Let me inquire how long a time do you gentlemen think you want to argue this case? You have two arguments, Mr. Moore. Suppose we ask you first.

Mr. Moore: I would say my opening argument should not take over 15 or 20 minutes at the most.

The Court: And your closing?

Mr. Moore: And the closing, depending on how many matters I have to rebut, I would say not over 15 minutes.

The Court: And what do you think, Mr. Wheeler?

Mr. Wheeler: I would think it would take about half an hour, that would be sufficient.

The Court: We will allow a half hour on each side for each argument, and the plaintiff's argument to be divided as counsel for the plaintiff sees fit; provided he opens his case in full in the opening argument, so that the defendant may respond to that case.

Now, ladies and gentlemen, we will take a recess so far as you are concerned until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate. Be here at 2:00 o'clock, please, and leave the court room.

(Whereupon the jury retired from the court room, and the following proceedings were had outside the hearing and presence of the jury:) [191]

The Court: The record shows that the jurors are all without the hearing of the court. Is there anything further at this time, gentlemen?

Mr. Wheeler: At this time, your Honor, I move that the jury be instructed to return a verdict for the defendant on the ground that the plaintiff has failed to sustain his burden of proof, that there is no evidence of negligence, as alleged in the complaint, and that it does not appear that there is any evidence to sustain the allegations of the second count.

Mr. Moore: Do you wish to hear from the plaintiff at all, your Honor?

The Court: Anything further, Mr. Moore?

Mr. Moore: Nothing, your Honor, other than to say that I move the court to direct the jury to bring in a verdict for the plaintiff, in that the evidence clearly shows that there has been negligence on the part of the defendant, and the sole question is one of damages. In response to the other question, assuming that that is not correct, there is still at least a conflict in the evidence sufficient to take this matter to the jury.

The Court: Is your motion predicated upon both counts of the complaint, or otherwise, Mr. Moore?

Mr. Moore: The motion to direct the jury to bring in a verdict is as to the first count, your Honor.

The Court: What do you say as to defendant's motion [192] as to the second count?

Mr. Moore: As to the second count, your Honor, we feel there is sufficient evidence to take the second count to the jury, based upon the fact that Mr. Owen testified, under examination by me, as to a course of conduct which was ordinarily followed, which seems to me from his testimony to require a protection of the canal of the ear, recognizing it as being an unusually sympathetic organ and one that is easily susceptible of injury; that there is at least circumstantial evidence, if not direct evidence, that he permitted a foreign substance to get

into the auditory canal, which would not be the exercise of the care and skill ordinarily followed in that particular profession or employment, namely, that of making ear molds for hearing aids. For that reason I feel that the defendant's motion as to the second cause of action should be denied.

The Court: Do you think there is any evidence in the record on the part of the plaintiff tending to show the customary, usual and approved method of doing this work by other than physicians or aurists?

Mr. Moore: I do, your Honor, in the very testimony of Mr. McKenna and Mr. Owen himself. Mr. McKenna, as supervisor for all of these Sears hearing aid departments, as I understand it, has been doing this work for a considerable period of time and has had 1500 to 2,000 impressions taken by him. [193] Mr. Owen himself, after taking his instructions from the Clark Laboratories and also from Mr. McKenna, did 150 impressions over the period of a year. It does not seem to me that we have to bring in some one from another store or another hearing aid department to testify what is the usual and customary method of carrying out this process.

The Court: If you rely upon that testimony, isn't all that it shows,—I mean, so far as the plaintiff's case is concerned now,—

Mr. Moore: Yes, your Honor.

The Court: —that the salesmen of Sears, Roebuck followed the usual, customary and approved method employed by those other than physicians in the matter?

Mr. Moore: That is correct, your Honor.

The Court: If they did so employ the method, where is there any basis for any case on the second count?

Mr. Moore: Our second count is based upon the lack of the use of this skill used by persons doing that sort of work in this particular case.

The Court: In other words, you are going to argue, under Mr. Owen's testimony as to the proper method, proper and approved method by those similarly situated in the trade, that Mr. Owen's activities at the time of the incident did not measure up to the standard?

Mr. Moore: Yes, it is my contention they did not measure [194] up to the standard.

The Court: Then you are going to apply the test. Have you any testimony in the case other than the doctors' evidence as to what the practice was in similarly situated businesses and trades?

Mr. Moore: Not other than Mr. Owen's and Mr. McKenna's testimony.

The Court: So that you are going to make your argument, if you are going to argue that, solely upon the evidence of Mr. McKenna and Mr. Owen?

Mr. Moore: Yes.

The Court: All right. I believe there is sufficient here to submit it to the jury under proper instructions. It seems to me that it is a factual question. I am not going to enlarge on it at this time except to state the reason for the ruling so that the litigants and counsel will be apprised as to why the court rules in the manner in which it is ruling.

The matter simmers down to a factual difference between Dr. Christ's testimony, together with the plaintiff's

evidence, his own testimony, of course, and the testimony of the defendants as to the presence or absence of this material in the ear after the incidents testified to as having occurred in the store of the defendant, Sears, Roebuck & Co. That is simply a factual question, and that was the reason why, in ruling on the motion for a non-suit, the court denied the [195] non-suit.

Dr. Ghrist's testimony, it seems to me, raised a material, corroborating feature there, which is purely a factual question for the jury; and, of course, the other crucial question to be discussed would be the question of damages, as to what would be the damages. And that would be a factual question, under proper instructions.

I haven't yet had time, gentlemen, because neither of you complied with the rules until this morning, to consider the requested instructions and the objections. I shall do so between now and 2:00 o'clock, and before the argument you will know, both of you, just which instructions the court is going to give. I am going to disregard the argumentative instructions. There are a number of them proposed by the plaintiff. And as far as seems proper, I am going to follow the approved instructions promulgated by the judges of the Superior Court of Los Angeles County, because this is essentially a local case.

We will meet at 2:00 o'clock, gentlemen.

(Whereupon, at 11:50 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [196]

Los Angeles, California, Thursday, May 9, 1946, 2:00 p. m.

(The following proceedings were had in chambers, outside the hearing and presence of the jury:)

The Court: Gentlemen, pursuant to Rule 51 of the Rules of Civil Procedure, both sides being represented by their respective counsel, in the absence of the jury I will tell you the instructions which I am going to give, first, and then I will tell you those which I am not giving.

The court is going to give plaintiff's requested instruction No. 7, No. 33—that looks like "33," Mr. Moore, and I am not sure—

Mr. Moore: Yes, that is right.

The Court: —33, 1, 5, 28—I have modified them some by striking out the words "You are instructed" in each proposed instruction, and in some other respects as indicated in the charge, but not in any substantial way, I think, and probably more a matter of phraseology than anything else—28, 15. I have incorporated in that the words "negligence and contributory negligence," so as to not make the instruction merely applicable to the issue of contributory negligence, but as to the both contributory negligence and negligence and I have stricken the matter from line 7 to and including line 10. I am giving 31, and I have inserted on line 7 after the word "departure" the words "if any," so that it will read "and [197] that this departure, if any, from the recognized practices proximately caused the injury and disability of the plaintiff." I am giving 18, and I have substituted on the first line in lieu of this phrase "one or the other of the parties" the words "either plaintiff or defendant," and I am not giving the second paragraph. 14 I have modified, and I practically adopted the objections made

by the defendant to the proposed instruction, and have also added at the end of the proposed instruction, commencing on line 28, after the period:

"The amount sued for is no criterion or test as to the damages you may award, if any, but is merely a limit beyond which you cannot go in any event."

I have also stricken the matter which occurs from line 22 to and including line 25, which relates to so-called permanent injury, having adopted the objection of the defendant that there was no evidence justifying any award for permanent injury.

Mr. Moore: May I interrupt at that point, your Honor?

The Court: Yes.

Mr. Moore: To ask you this: I gather that it would be improper, then, in making my talk to the jury to mention testimony of Mrs. Hartley to the effect that she noticed some difference before and after, since that evidence was on that issue, and I don't want to make any comments to the jury which [198] are inconsistent with your Honor's instruction.

The Court: I don't know if that would be inconsistent. I will read to you the instruction, and then you can decide:

"If you should find for the plaintiff, then in fixing the sum in assessing the damages, you will be reasonable and just and fix such sum as will in your honest and deliberate judgment, compensate the plaintiff for his injuries, if any, he has sustained as a result of the fitting of the hearing aid. The elements entering into such damages are as follows:

"1. Such sum as will reasonably compensate the said plaintiff for the necessary expenses"—

Now, the word "fairly" should go out, the adverb there. ". . . reasonably compensate the said plaintiff for the necessary expenses, if any, that he has paid for doctor bills, hospital bills, and medicines not to exceed $23.00.

"2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, or which he is reasonably certain to suffer in the future therefrom, if any.

"The element with respect to the expense incurred to date hereof, if any, is subject of direct proof and must be determined by the jury from the direct evidence that they have before them. The element with respect to the pain and suffering, if any, of the plaintiff is left to the sound discretion of the jury for their determination under all the evidence and circumstances in proof in this case."

Then the last paragraph with respect to the amount sued for, and that the amount is no criterion.

Mr. Moore: Thank you, your Honor.

The Court: Those are all of the instructions requested by the plaintiff that I am giving.

Now, so far as the defendant is concerned, there was an instruction here that I could not get the number of, Mr. Wheeler. I think it was No. 14. It is the one on which there is a citation: California Jury Instructions No. 30. I think it was handed in this morning.

Mr. Wheeler: Yes, that was No. 14, your Honor.

The Court: I am going to give that.

Mr. Moore: Is that the one, "If and when you should find"—

The Court: That is right. I am giving No. 4:

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent."

I am giving No. 5. I am giving No. 1, and I have added to it a little bit. I have added the following after the word "person":

"The burden of proving negligence on the part of defendant is upon the plaintiff and in order for the plaintiff to recover he must prove such negligence by a preponderance of the evidence."

Now, I am giving a couple of instructions upon my own motion, because I think neither of you covered the matter. One is:

"Contributory negligence is negligence on the part of a person injured which, co-operating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

"One who is guilty of contributory negligence may not recover from another for the injury suffered. The reason for this rule is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation."

That is taken from this book of instructions. Then another: [201]

"Where the evidence respecting the issue of negligence of defendant or of contributory negligence of plaintiff is evenly balanced, it cannot be said to preponderate.

"The burden of proving negligence of defendant rests throughout the case upon the plaintiff and the burden of proving contributory negligence on part of plaintiff rests upon the defendant."

Then I am giving No. 2 and No. 6. I have stricken from 6: "the mere fact that an accident happened, considered alone, would not support a verdict for any particular sum." I think that is covered by another instruction.

Mr. Wheeler: Yes, your Honor.

The Court: I am giving No. 8, No. 12, No. 7, and No. 9.

All of the other proposed instructions I am not giving, except as they are modified in the instructions which will be given, and except also as the principles stated in those proposed instructions that are not given are contained in the portion of the instructions given.

Do you all understand it now?

Mr. Wheeler: Yes, your Honor.

Mr. Moore: I just wanted to check for a moment to see if a certain instruction on contributory negligence has been given.

The Court: The one that I prepared was: [202]

"Contributory negligence is negligence on the part of a person injured, which, co-operating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains."

That is taken from this book of instructions here. Which one do you have in mind? One of your proposed instructions?

Mr. Moore: I was trying to ascertain here, your Honor.

The Court: For instance, No. 22 was one which I think contained elements there. So with No. 10 and so with No. 21.

Mr. Moore: Yes, I think that has been covered, your Honor.

The Court: All right, gentlemen. You know this is going to cut us down a little in the time, but I have to comply with the rules.

Mr. Sobieski: With reference to this instruction No. 14, plaintiff's requested No. 14, you went with us on the point of—

The Court: Is that a damage instruction?

Mr. Sobieski: Yes, that is a damage instruction, sir. The second sub-paragraph allows for future damages.

The Court: "Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, [203] if any, or which he is reasonably certain to suffer in the future therefrom, if any."

The evidence which would support that, and I am not expressing any opinion upon it, but you will remember his testimony about his head hurting him, or not hurting him so much, that he had a sensation up there, and his wife testified that he experienced discomfort yet to some extent.

Mr. Sobieski: We thought that both doctors testified he was cured, and the other doctor testified this could be due to another ache or some transference.

The Court: But that would not bar the jury from determining whether they believed the doctor or not.

Mr. Wheeler: May there be an exception noted to that, your Honor?

The Court: Oh, yes. The rule requires that you may state it out of the presence of the jury, and you may state it now.

Mr. Wheeler: We can state it right now, and the authority for the exception is the case of—do you have that?

Mr. Sobieski: That is cited under the first one of our objections. That is Silvester v. Scanlan, 136 Cal. App. 107.

The Court: Perhaps I had better read that again. What was that page?

Mr. Sobieski: 107, sir.

The Court: That is one of the purposes of this rule, [204] that you should cite your authorities so that we will have them to look at.

Mr. Wheeler: Certainly.

The Court: That is a bad case, I think. I don't think that would cover here. Here they had two trials, apparently, and this woman has just sustained some trivial superficial injury and the first jury returned a verdict of $10,000.00. These doctors came in with that characteristic traumatic neurosis, and the court granted a new trial. On the second trial the jury awarded her $12,500.00, and in the course of the trial they brought out this question of insurance. I think that is a different case than you have here. You haven't any traumatic neurosis here. And there may be some room for the jury here to find it is pretty hard for a doctor to say whether an individual suffers pain. Pain and anguish of that type is something which I don't think can be reduced to a scientific nicety. I think we will have to let the instructions stand, with the exception noted.

All right, gentlemen. If you want to cut your argument any by reason of our taking this time, you may do so. Otherwise we may have to have the jury out tonight. But I am not insisting that you do so.

(Thereupon the proceedings were resumed in the court room in the hearing and presence of the jury, as follows, to-wit:) [205]

The Court: All present. Proceed with the argument, Mr. Moore.

(Opening argument on behalf of the plaintiff by Mr. Moore.)

(Argument on behalf of the defendant by Mr. Wheeler.)

(Closing argument on behalf of the plaintiff by Mr. Moore.)

The Court: Ladies and gentlemen of the jury, you are instructed as follows:

It is the exclusive province of the court to instruct you as to the law applicable to this case in order that you may render a verdict upon the facts as determined by you and the law given by the court in its instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any view of the law other than that given you by the court.

On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose. The court cannot determine the facts or aid you in arriving at them, except by giving you the rules of law to be used by you in arriving at the truth.

There are two classes of evidence which are recognized by and admitted in courts of justice, upon either of which juries may render their verdict. One is direct and positive testimony of an eye witness and other direct evidence, and the other is proof or testimony, or other evidence, of a chain of circumstances pointing sufficiently strong to affirmatively [206] establish the facts in dispute, and which is known as circumstantial evidence. There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. Circumstantial evidence, like direct evidence, is legal and competent evidence to be received in civil cases. All that is required with reference to either direct or circumstantial evidence is that the testimony and other evidence shall be sufficient to convince you, as a member

of this jury, as a reasonable and prudent man or woman, of the truth of the facts.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any act, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point.

The defendant, Sears, Roebuck & Co., is a corporation and [207] as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent done within the scope of his authority are in contemplation of law the acts and omissions, respectively, of the corporation whose agent he is.

It has been established that Frank Owen was an employee of the defendant, Sears, Roebuck & Co., that he was the manager in charge of the hearing aid department of the store of the defendant located at 2650 East Olympic Boulevard, Los Angeles, California, and that on or about the 13th day of October, 1945, said Frank Owen, acting as the agent of said defendant corporation and within the scope of his authority, fitted a hearing aid for the plaintiff, and in that connection prepared molds of a plaster-like substance in and for both of plaintiff's

ears. Thus, the conduct of said Frank Owen shall be deemed by you to have been the conduct of the corporation, Sears, Roebuck & Co.

In determining the rights and obligations of the defendant with respect to the fitting by defendant's employees of hearing aids, certain established rules of law are applicable.

If a person suffering from defective hearing goes to another person for the obtaining of a hearing aid and the fitting thereof, and then enters into an agreement for the purchase and fitting of said hearing aid, and the fitter of the hearing aid undertakes the process of so fitting such an [208] aid on said person whose hearing is so impaired, the law created for the parties is called an implied contract, and under said implied contract the person employed to so fit said hearing aid impliedly contracts that he possesses that reasonable degree of learning and skill ordinarily possessed by others of his profession or craft in his locality and that he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed.

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfil his burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not

negligent, or if he was, his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established.

Because I have given or will give you instructions on negligence or contributory negligence, it is not to be taken [209] that the court thereby thinks the defendant was guilty of negligence or the plaintiff was guilty of contributory negligence, or that I have any opinion on the subject.

If you find from the evidence that Frank Owen, as the agent and employee of defendant, departed from recognized practices exercised by persons fitting hearing aids in this community on or about the month of October, 1945, and that this departure, if any, from the recognized practices proximately caused the injury and disability of this plaintiff, then your verdict should be for the plaintiff.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. The burden of proving negligence on the part of the defendant is upon the plaintiff, and in order for the plaintiff to recover he must prove such negligence by a preponderance of all of the evidence.

Contributory negligence is negligence on the part of a person injured which, co-operating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

One who is guilty of contributory negligence may not [210] recover from another for the injury suffered. The reason for this rule is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

Where the evidence respecting the issue of negligence of defendant or of contributory negligence of plaintiff is evenly balanced, it cannot be said to preponderate. The burden of proving negligence of defendant rests throughout the case upon the plaintiff and the burden of proving contributory negligence on part of plaintiff rests upon the defendant.

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore we ask: "What conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances?" Our answer to that question gives us a [211] criterion by which to determine whether or not the evidence before us proves negligence.

Negligence on the part of either the plaintiff or defendant is of no consequence unless it be a proximate cause of the injury or damage complained of. By proximate cause is meant the efficient cause, the one that necessarily sets other causes in operation.

The burden rests upon the plaintiff to prove by a preponderance of the evidence elements of his damage, if any. And by a preponderance of evidence, ladies and gentlemen, is meant such evidence as, when it is weighed with that that is opposed to it, has more convincing force and from which it results that a greater probability is in favor of the party upon whom the burden rests.

It is the duty of a person who has been injured by the negligence of another to use reasonable diligence in caring for his injuries and reasonable means to prevent their aggravation and to effect a recovery.

When one does not use reasonable diligence to care for his injuries and they are aggravated as a result of such failure, the liability of another, whose negligence was a proximate cause of the original injury, must be limited by the amount of damage that would have been suffered if the injured person himself had exercised the diligence required of him. [212]

If your verdict should be for the plaintiff you should, in calculating his general damages, make no award for loss of earnings because there is no evidence of loss of earnings as a result of this accident. For the same reason you should make no award for loss of future earnings because there is no evidence that any earnings will be lost in the future as a result of this accident.

If you should find for the plaintiff, then in fixing the sum in assessing the damages, you will be reasonable and just and fix such sum as will in your honest and deliberate judgment, compensate the plaintiff for his injuries, if any he has sustained, as a result of the fitting

of the hearing aid. The elements entering into such damages are as follows:

1. Such sum as will reasonably compensate the said plaintiff for the necessary expenses, if any, that he has paid for doctor bills, hospital bills, and medicines, not to exceed $23.00.

2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, or which he is reasonably certain to suffer in the future therefrom, if any.

The element with respect to the expense incurred to date hereof, if any, is subject of direct proof and must be determined by the jury from the direct evidence that they have before them. The element with respect to the pain and suffering, [213] if any, of the plaintiff is left to the sound discretion of the jury for their determination under all the evidence and circumstances in proof in the case.

The general damages in all, however, that may be awarded to the plaintiff, cannot exceed the amount sued for, to-wit, the sum of $10,000.00. The amount sued for is no criterion or test as to the damages you may award, if any, but is merely a limit beyond which you cannot go in any event.

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether

you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Ladies and gentlemen, when you retire to the jury room you will choose one of your number to act as foreman, and then will proceed to deliberate carefully, cautiously, dispassionately and impartially upon all of the evidence in the case, and apply the law thereto as it has been given to [214] you in the instructions from the bench in the court room in this case, and when you shall reach unanimous agreement, that is to say, when each and every one of your number shall agree upon a verdict, you will have it reduced on one or the other of the blank forms which have been prepared by the clerk for your convenience only, fill it out in accordance with your unanimous agreement at the appropriate places and spaces by your foreman, and return into court with the signed verdict.

Counsel, have you seen these proposed forms of verdict which the clerk has prepared?

Mr. Wheeler: Yes, we have, your Honor.

Mr. Moore: Yes, we have, your Honor.

The Court: Which of them are satisfactory to both of you? If you will indicate it, I will give those two forms.

(The documents referred to were selected by counsel.)

The Court: These are the two forms of verdict. They will now be handed to the bailiff. Swear the officers to take charge of the jury, Mr. Clerk.

(The officers were duly sworn.)

The Court: Please go with the officers, ladies and gentlemen. If they desire this illustration, may they have it, gentlemen? It has not been marked as an exhibit.

Mr. Wheeler: Yes.

Mr. Moore: We have no objection.

The Court: That is the drawing. [215]

The Clerk: Do you wish the jury to take the exhibits?

The Court: If they so desire; all that have been received in evidence. I don't believe that last plaster of Paris cast was received in evidence.

Mr. Wheeler: My recollection is that I offered it.

Mr. Moore: I raise no objection.

A Juror: Your Honor, if the clerk has a magnifying glass, we would like to borrow it.

The Clerk: We have a small one.

The Court: Tell them to be sure to preserve it, though.

Mr. Wheeler: Here is a larger one, if we can have the same assurance.

(Whereupon, the jury retired for its deliberations, and the following proceedings were had outside the hearing and presence of the jury:)

The Court: Now, gentlemen, with respect to the requested instructions that have not been given, as I told you in chambers I have passed upon all of them and upon each I have indicated the action of the court in not giving it, or in giving it as modified, or in declaring it was not given because substantially given in other instructions, and I shall file those with the clerk; and if you desire to take any further action, either of you, with respect to either the charge as given or the instructions that have been requested and not given, you may do so at this time. [216]

Also, gentlemen, I think I shall file with the clerk now the objections of both plaintiff and the defendant to the proposed instructions of his opponent.

Mr. Moore: All right.

The Court: Then the file will be complete. These are the ones that were presented this morning. I think I got both of these today, did I not?

Mr. Wheeler: That is correct, your Honor.

Mr. Moore: Yes, your Honor.

The Court: So they should be marked filed as of today.

Mr. Wheeler: If your Honor please, we have already stated our objection to the instruction as to the feature of damages. It isn't my purpose to repeat it, other than for the purpose of the record, and we object upon the grounds stated in the written objections as heretofore filed.

The same is true as to the objection in which mention was made of the sum of $10,000.00, on the ground that was unwarranted under the evidence.

Mr. Moore: Your Honor, I have no exceptions to the charge as given. I would like a few moments to go over the instructions which were refused and then make my statement, if I may.

The Court: Very well. I will be here until the jury returns its verdict. We will take a recess at this time.

(Recess.) [217]

Los Angeles, California, Thursday, May 9, 1946. 5:03 p. m.

The Court: The record shows that all of the jurors are present, gentlemen.

Ladies and gentlemen, have you agreed upon a verdict?

The Foreman: We have, sir.

The Court: You may hand it to the bailiff, please, Mr. Foreman.

(The document referred to was handed to the bailiff, and then to the court.)

The Court: Read the verdict of the jury, Mr. Clerk.

The Clerk: "In the District Court of the United States, in and for the Southern District of California, Central Division. No. 5103-M Civil.

"Fred Hartley, Plaintiff, vs. Sears, Roebuck & Company, a corporation, Defendant. Verdict.

"We, the Jury in the above-entitled cause, find for the Plaintiff, Fred Hartley, and against the Defendant, Sears, Roebuck & Company, and assess general damages in the sum of Three Thousand Dollars, and special damages in the sum of Twenty-three Dollars. [218.]

"Los Angeles, California
May 9th, 1946.

"Milton Holden Berg,
Foreman."

The Court: Ladies and gentlemen, is that your verdict, so say you one, so say you all?

Voices: Yes, sir.

The Court: The verdict being complete, file it, Mr. Clerk, and later, under the direction of the court at the appropriate time, enter the judgment pursuant thereto.

The Clerk: Yes, your Honor.

The Court: Ladies and gentlemen, you are discharged from further consideration of this case, and you may go home until you are called again. You will be notified when that will be.

CERTIFICATE.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 20th day of May, A.D., 1946.

MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed July 20, 1946. [219]

[Endorsed]: No. 11399. United States Circuit Court of Appeals for the Ninth Circuit. Sears, Roebuck & Co., a Corporation, Appellant, vs. Fred Hartley, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 31, 1946.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States for the Ninth Circuit

No. 11399

FRED HARTLEY,

Plaintiff and Appellee,

vs.

SEARS, ROEBUCK & CO., a corporation, et al.,

Defendant and Appellant.

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD

The appellant, Sears, Roebuck and Co., hereby adopts, as its statement of points and designation of the parts of the record to be printed, pursuant to Rule 19(6) of this Court, the statement of points and designation of the record filed in the District Court pursuant to Rule 75 of the Rules of Civil Procedure, the same being a part of this record on appeal, and designates the entire record on appeal for printing.

Dated: 26 July 1946.

JOHN L. WHEELER
JOHN G. SOBIESKI
Attorneys for Appellant, Sears, Roebuck and Co.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 31, 1946. Paul P. O'Brien, Clerk.

No. 11399.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a corporation,

Appellant,

vs.

FRED HARTLEY,

Appellee.

APPELLANT'S OPENING BRIEF.

JOHN L. WHEELER,
JOHN G. SOBIESKI,
1241 Pacific Mutual Building, Los Angeles 14,
Attorneys for Appellant, Sears, Roebuck & Co.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

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No. 11399.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a corporation,

Appellant,

vs.

FRED HARTLEY,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Jurisdiction in the District Court was based on 28 U. S. C. A. 41 granting it jurisdiction over suits of a civil nature between citizens of different states where the matter in controversy, exclusive of interest and costs, exceeds $3000.

Respondent, Fred Hartley, brought suit in the Superior Court of the State of California, in and for the County of Los Angeles, against Appellant, Sears, Roebuck & Co. and others (later dismissed as to the others) alleging in his complaint that he had been damaged in the sum of $10,000 through its negligence in the fitting of a hearing aid sold him [pp. 2-8]. (All page references herein are to the printed Transcript of Record.) The action was removed

pursuant to 28 U. S. C. A. 71 to the District Court of the United States for the Southern District of California, Central Division, on a verified petition alleging, among other things, that Fred Hartley was a citizen and resident of the State of California and that Sears, Roebuck & Co., a corporation, was a citizen and resident of the State of New York [p. 10].

Following such removal the action was tried by said District Court which on May 10, 1946, entered a final judgment on a jury verdict in favor of Fred Hartley and against Sears, Roebuck & Co. in the sum of $3,000 general damages, $23.00 special damages, and $63.60 costs [pp. 26-28]. Notice of appeal was filed July 1, 1946 [p. 28]. Appellate jurisdiction in the Circuit Court of Appeals to hear this appeal is conferred by 28 U. S. C. A. 225.

Statement of the Case.

This is an appeal from a judgment on a verdict of $3,000 general damages, $23 special damages, and $63.60 costs in favor of Respondent and against Appellant [pp. 26-28].

The facts out of which the case arose are that Respondent, who had become increasingly hard of hearing over a ten-year period of time [pp. 59-60] purchased a Zenith hearing aid from Appellant's retail store at Ninth and Boyle Streets in Los Angeles on October 13, 1945 [pp. 32, 35, 36]. To secure a good fit for the earpiece, molds were made of respondent's ears by Appelant's employee [pp. 36-38]. After the taking of such molds a

small piece of mold plaster, about one-third of an inch long [p. 91] apparently remained in Respondent's left ear, in the inner third of the ear canal, on the outside of the eardrum [pp. 84, 87]. This was removed from the ear by a physician on October 16, 1945 [p. 86]. There was no hole in the eardrum [p. 87] but on removal of the foreign substance there was a severe amount of inflammation and a little infection [pp. 87-88]. On November 2, 1945, "the whole thing had subsided markedly and was about gone" [p. 88] and Respondent's attending physician further testified that "on November 9th I have a note that he looked normal and we discharged him" [p. 88].

There was no evidence that Respondent, who was foreman of a die shop [p. 59], lost any wages as a result of this injury, or that he would lose wages in the future, or that this accident had impaired his hearing which, Respondent testified, had been getting worse over a period of years [pp. 59-62].

The general damages awarded Respondent were solely to compensate Respondent for the pain which he had suffered as a result of this accident and which he would suffer in the future. [See the instructions on the elements of damages, p. 203.]

The questions involved on this appeal are two:

1. Was it error for the trial court to instruct the jury that they could award Respondent damages for the "physical pain, * * * which he is reasonably certain to suffer in the future therefrom, if any?" This question

was raised by objection and exception in the trial court to said instruction. (Specification of Error No. 1.) Respondent's own physician testified that respondent's ear had returned to normal six months prior to trial [pp. 31, 88]. Respondent testified that the last time he suffered pain was about six and one-half months prior to trial [pp. 79, 80, 31]. There was no testimony that it was even possible that Respondent would suffer pain in the future. Appellant contends that, in the absence of evidence of future pain, the trial court committed prejudicial error in instructing the jury it could award Respondent damages for the physical pain he was reasonably certain to suffer in the future.

2. Was the verdict so excessive as to lead to the conclusion it was based on passion or prejudice? This question arises on appeal from the judgment. (Specification of Error No. 2.) Appellant contends that the pain which Respondent suffered, while regrettable, lasted but a few days, resulted in no loss of wages, and comes so far short of warranting an award of $3,000.00 as to indicate the award was based on passion and prejudice.

SPECIFICATION OF ERRORS.

I.

The Trial Court Erred in Instructing the Jury That the Jury Could Award Respondent Damages for the Physical Pain He Was Reasonably Certain to Suffer in the Future, There Being No Evidence Respondent Would Suffer Future Pain.

The instruction given was as follows:

> "The elements entering into such damages are as follows:
>
> 1. * * * (Special Damages of $23.00) * * *
>
> 2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, *or which he is reasonably certain to suffer in the future therefrom, if any.*" [p. 203].

The objectionable portion has been italicized.

The objection urged against this instruction in the trial court was that it was "unsupported by the evidence." (See written objections Nos. V and VIII to Plaintiff's proposed instructions 14 and 23 wherein Appellant asserted they were "unsupported by the evidence," "There is no evidence that Plaintiff suffered permanent injuries," "There is no evidence he will have future pain and suffering as a result of this accident") [pp. 24, 25]. Oral objection and exception was also made and the case of *Silvester v. Scanlan,* 136 Cal. App. 107, 28 P. (2d) 97 (hearing denied by California Supreme Court) was cited wherein a judgment was reversed because an instruction

allowing recovery for future pain and suffering was given in a case in which the evidence did not support such instruction [pp. 194-196]. The oral objection was later repeated [p. 206]. Appellant also submitted a proposed instruction (No. 13) which the Court refused, except as covered elsewhere, and the language in such instruction which the Court did not give, there or elsewhere, was the following:

> "* * * if you find for the Plaintiff, you should fix your award of general damages in such sum as will compensate Plaintiff for such pain, suffering and anxiety, if any, as you find Plaintiff has suffered in the past as a result of this accident." [p. 23].

This language, which Appellant contends was appropriate, was refused in favor of the language, to which Appellant objected and excepted, that the jury could award Respondent damages for the pain he would suffer in the future.

II.

The Verdict of $3,000 General Damages for the Pain Respondent Suffered or Will Suffer Is so Excessive as to Appear to Have Been Given as a Result of Passion and Prejudice, Thereby Justifying Reversal or Reduction of the Judgment.

This specification is based on an examination of all the evidence on the question of damages, to be considered hereafter in the argument.

Summary of Argument.

1. An instruction that the jury may make an award of damages to compensate for future pain is erroneous if there is no evidence the injured party will sustain future pain. The evidence must show a "reasonable probability" of such pain before an instruction may be given that damages may be awarded for future pain. At the time of trial, and for some time prior to the trial, Respondent's condition was normal. A review of the evidence shows there was no evidence he would suffer future pain, either to a reasonable probability or at all.

2. The pain which Respondent endured, while regrettable, falls far short of what would justify an award of $3,000. He suffered severe pain when his physician endeavored to remove the foreign matter from his ear without an anesthetic, and suffered pain and dizziness intermittently for 12 days thereafter. But there was no loss of wages and no serious medical condition developed. The award of $3,000 for such a temporary suffering, regrettable though such suffering was, is excessive and indicates the jury was influenced by passion or prejudice.

ARGUMENT.

I.

The Trial Court Erred in Instructing the Jury That They Could Award Respondent Damages for the "Physical Pain . . . Which He is Reasonably Certain to Suffer in the Future Therefrom, if Any," There Being No Evidence Respondent Would Suffer Future Pain.

As shown by Specification of Error No. 1 herein, Appellant in the court below not only objected and excepted to this instruction but also proposed an instruction (refused as to this point) limiting the damages to past pain and suffering. Consequently the correctness of this instruction is open to question on this appeal.

A. The Law Is Well Settled That an Instruction That Damages May Be Awarded for Detriment to Be Suffered in the Future Is Erroneous Unless There Is Evidence That Such Detriment Actually Will Be Suffered With Reasonable Certainty.

This question is controlled, in California, by Section 3283 of Civil Code which is as follows:

> "Injuries resulting or probable after suit brought. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, *or certain to result in the future.*" (Italics ours.)

Silvester v. Scanlan, 136 Cal. App. 107, 28 P. (2d) 97 (hearing denied by California Supreme Court), is decisive. In that case a judgment was reversed because the

trial court instructed the jury they could award damages for future suffering. The Appellate Court stated:

> *"Whether this portion of the instruction correctly states the law or not is unimportant, as no instruction on the subject of future worry was justified.* Section 3283 of the Civil Code provides that 'damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.' In construing this section it has been said that to justify a recovery for future consequences the evidence must show with a reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury will not warrant a verdict for damages. (Citing.) Here there was no evidence that plaintiff would with reasonable certainty suffer any future disability as a result of her alleged injuries. . . . Consequences which are contingent, speculative, or are merely possible are not to be considered. It is not enough that the injuries received may develop into more serious conditions than those which are visible, nor even that they are likely to develop. *To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability as amounts to a reasonable certainty that they will result from the original injury.* Here there is no such evidence. By reason of the giving of the instructions referred to, it is impossible to say what portion of the verdict was given to plaintiff for her slight physical injury and subsequent alleged suffering, and what portion represented prospective damages for mental ailments that might or might not be suffered in the future.

"For the reasons given the judgment is reversed." (Italics ours.) (136 Cal. App. 107, 110, 111, 28 Pac. (2d) 97, 99.)

The *Silvester* case was cited with approval and the italicized language setting forth the requirement of evidence of a reasonable certainty of future detriment was quoted with approval in the case of *Bellman v. San Francisco High School District,* 11 Cal. (2d) 576, 81 P. (2d) 894. In the *Bellman* case a judgment for $15,000 for a skull fracture and brain injury of a high school girl was reduced to $5,000 because the evidence of prospective detriment was insufficient. (The propriety of the form of the instructions given was not discussed.) The Court also stated:

"By this section (Sec. 3283), in an action for personal injuries recovery is limited so far as physical suffering, or pain, or mental anguish is concerned, to compensation for the consequences which have occurred up to the time of the trial, or it *is reasonably certain under the evidence will follow in the future.* (Citing.) *The jury may not consider consequences which are only likely to occur.*" (Italics ours.) (11 Cal. (2d) 576, 588, 81 P. (2d) 894, 900.)

The latest decision of the California Supreme Court which discusses Civil Code, Section 3283, is the case of *Caminetti v. Pacific Mutual Life Ins. Co.,* 23 Cal. (2d) 94, 103, 142 P. (2d) 741, 745, 746, which case reaffirms the holding of the case of *Bellman v. S. F. High School District,* 11 Cal. (2d) 576, 81 P. (2d) 894, that future

detriment must be proved to a reasonable certainty to justify an award of damages therefor. In the *Caminetti* case, *supra,* the California Supreme Court held:

> "Of course, the proof must establish with reasonable certainty and probability that damages will result in the future to the person wronged. Civ. Code, Sec. 3283. . . . *It is a question of the degree of proof necessary to establish with reasonable certainty that damage will result.* If the proof does establish with reasonable certainty that future damages will result from the wrong then they may be allowed. Williston, Contracts (rev. ed.), Sec. 1346; Myers v. Nolan, 18 Cal. App. (2d) 319, 63 Pac. (2d) 1216; *see Bellman v. San Francisco H. S. Dist.,* 11 Cal. (2d) 576, 81 Pac. (2d) 894." (Italics ours.) (23 Cal. (2d) 94, 103, 142 P. (2d) 741, 745, 746.)

B. There Was No Evidence That Respondent Was "Reasonably Certain" to Suffer Pain in the Future.

Respondent's attending physician, Dr. Ghrist, testified he was an eye, ear, nose and throat specialist [p. 82]. He testified that on October 15, 1945, he endeavored unsuccessfully to remove the ear plaster from Respondent's ear without an anesthetic [pp. 82, 85]. On October 16, 1945, using an anesthetic, he removed about one-third of an inch of ear plaster [p. 91] from the lower third of the ear canal [pp. 86, 87]. The eardrum was "intact, but red and inflamed" [p. 95]. ". . . there was no hole in the eardrum. I notice that there was a severe amount of inflammation, and the membrane began to swell within a few minutes after the material was removed from the inner third of the ear canal" [p. 87]. He recalled giving no treatment to the ear other than to "flush it out and use

a disinfectant" [p. 87]. On October 17 he looked at Respondent but gave no treatment [p. 87]. On October 19 Respondent "came to my office stating that he still felt sick and dizzy, and we gave him at that time some sulfadiozine" [p. 87]. ". . . there must have been a little infection because I would not have given him the sulfadiozine on October 19th had I thought that it was merely pressure" [p. 88]. "If you take any foreign body and hold it against a membrane a length of time there is generally a little infection . . ." [p. 96]. "I saw him again on October 22nd, at which time he was improved and we discontinued the sulfadiozine" [p. 88]. Dr. Ghrist saw Respondent again on October 29th and "On November 2nd there was—the whole thing had subsided markedly and was about all gone, so at that time we did an audiograph on him to see how much he could hear, or how much he couldn't hear. And then *on November 9th I have a note that he looked normal and we discharged him*" [p. 88]. (Italics ours.)

There is no evidence by the attending physician of any condition which could cause future pain. The testimony of Respondent's physician, a specialist, is that Respondent's ear had returned to normal November 9th, six months prior to the trial. Respondent's physician also testified that his impression of the cause of Respondent's deafness (a progressive condition) was that it was catarrhal [pp. 99, 100]. Dr. George W. Brown, a specialist called by Appellant, testified as follows concerning his examination of Respondent: "So I didn't see anything wrong with his ear from any injury, and according to the tuning fork tests he has catarrhal deafness . . ." [p. 173]. There was no cross-examination on this testimony.

One further aspect of the medical testimony should be noted. There was no evidence whatever that any condition in Respondent's ear was likely to or even possibly could cause Respondent pain in the future. If such a possibility were present it is obvious that Respondent's specialist would have pointed it out in his testimony. The expert evidence, of both sides, is completely in accord with the testimony of the attending physician that Respondent's ear had returned to normal November 9, 1945, six months prior to trial.

Respondent's testimony was that on October 15th Dr. Ghrist tried to remove the plaster without an anesthetic and that Respondent couldn't stand the pain [pp. 46, 48]. It hurt during the night [p. 48]. After the anesthetic on the 16th he slept until the 17th when he had a dull ache [p. 50]. He drove his car home [p. 50], stopping at the factory, where they told him to go home [p. 78]. He returned to work the next morning [p. 78]. About two or three days later Respondent felt dizzy, his ear ached; he saw Dr. Ghrist who prescribed sulfa [p. 51]. He returned to Dr. Ghrist in three or four days, who said, "It is coming along pretty good" [pp. 51-52]. Respondent testified that about October 25th he went home from work sick to his stomach about 1 P. M. and returned to work the following day around noon [pp. 79-80]. He worked a couple of hours and then came home and didn't work Saturday or Sunday [p. 80]. His head started to fill up and his ear started hurting again "so I went and took some more sulfa drugs because I thought the infection

was coming again" [p. 52]. ". . . that Saturday night something seemed to bust in my ear, like it opened up, and then it started to run again, all over the pillow, and then I felt all right" [p. 52].

> "Q. And it didn't pain you after that? A. No; just left me, you know, that there was something there. Then it started getting better from then on" [p. 80].

Since Respondent testified the preceding Thursday was October 25th [p. 79] the night of the following Saturday and Sunday would be the night of October 27-28, 1945. This night, fixed by Respondent as the last time he suffered pain, was 12 days before Dr. Ghrist concluded the ear had returned to normal and discharged him, and was about 6½ months prior to the trial. (The trial was May 8-9, 1946 [pp. 26-27].)

Respondent testified that in addition to the pain that he also had an "annoying feeling, but I figured it would get better by itself" [p. 55]. This feeling was as if a fly was bothering him over the left ear [pp. 55-56]. Respondent did not testify that he ever mentioned this feeling to his physician and Dr. Ghrist testified that he doesn't recall that Respondent ever mentioned it to him [p. 101]. Respondent testified that this subjective sensation lasted "until about five or six weeks ago (prior to trial). It didn't bother me. Just annoyed me is all; no pain" [p. 55].

The foregoing subjective symptom, apparently not considered important enough even to mention to the attending

physician, or so far as the record shows to anyone else prior to the trial, got better by itself as Respondent had expected and ceased five or six weeks before the trial, according to Respondent's testimony. At the time of trial, therefore, six months had elapsed since Respondent's physician, a specialist, had discharged him because his ear had returned to normal. At the time of trial Respondent was normal. At the time of trial it was then 6½ months since Respondent had suffered any pain. There was no testimony, by anyone, that there was even a *possibility* that Respondent would suffer pain in the future. Had such a possibility existed it seems obvious that Respondent's physician, a specialist, would have testified to it.

Against such a factual basis there clearly was no substantial evidence in this case from which the jury could properly conclude that there was a "reasonable certainty" that Respondent would suffer pain in the future. The evidence utterly failed to support such a conclusion. Consequently it was prejudicial error to submit to the jury the question of future pain and instruct the jury that they could award Respondent damages for the "physical pain . . . which he is reasonably certain to suffer in the future therefrom, if any" [p. 203].

II.

The Verdict of $3,000 General Damages for the Pain Respondent Suffered and Will Suffer Is so Excessive as to Appear to Have Been Given as a Result of Passion or Prejudice, Thereby Justifying Reversal or Reduction of the Judgment.

A. There Was No Evidence of Future Pain.

We have previously shown, under Point I, that there was no evidence to support an award for future pain. Consequently the verdict must be considered in relation to the pain Respondent had suffered in the past.

B. The Evidence Shows the Injury and Pain Which Respondent Had Suffered in the Past Were Minor and Temporary.

The evidence concerning his pain has previously been analyzed, under Point I, and the following limits to such pain were clearly established. Respondent's discomfort was principally as follows: On October 15, 1945, his physician attempted to remove the mold plaster without an anesthetic. This caused severe pain [pp. 84-85]. On October 19, 1945, Respondent felt sick and dizzy and Dr. Ghrist gave him some sulfaldiozine [p. 87]. Dr. Ghrist testified—"there must have been a little infection because I would not have given him the sulfadiozine on October 19th had I thought that it was merely pressure" [p. 88]. "I saw him again October 22nd, at which time he was improved and we discontinued the sulfadiozine" [p. 88]. Respondent testified that on October 25th he felt sick again and, without contacting his physician, he took some more sulfa drugs and Saturday night (October 27th) the infection seemed to burst and then he felt all right [pp. 52, 80]. It didn't pain after that [p. 80].

From the foregoing it appears that Respondent suffered pain intermittently for a period of approximately 12 or 13 days.

While such pain is regrettable, it should also be pointed out that there was no evidence of any loss of wages. Respondent, a foreman, presumably could arrange his working hours so that the minor losses of time involved in the treatment of his ear resulted in no loss of wages.

The treatment given by the attending physician, a specialist, shows clearly the minor nature of Respondent's injury. Dr. Ghrist testified that at the time he removed the piece of ear mold he recalls giving no treatment "Other than to flush it out and use a disinfectant" [p. 87]. He testified that on October 19th he gave Respondent some sulfadiozine because "there must have been a little infection" [pp. 87-88]. Although Dr. Ghrist saw Respondent from time to time thereafter until he was discharged from treatment as normal on November 9, 1945, the foregoing comprises all the treatment of the ear by the attending physician. Dr. Ghrist's testimony was corroborated by Respondent:

> "Q. What, if anything, did he do to you each time you went there? A. Never done anything; just looked at it.
>
> Q. Did he give you any other medicine, other than the sulfa? A. No. He told me not to take any more sulfa drugs" [p. 53].

The foregoing review of the medical treatment given Respondent shows that although under the care of a specialist, but little treatment was necessary. In Respondent's words, the doctor "Never done anything; just looked at it" [p. 53]. Since Respondent was in good hands the

inference is irresistible that his condition did not require treatment and, as set forth above, he was soon discharged. While it is unfortunate that Respondent suffered at all, the evidence appears conclusive that his injury was minor and his pain temporary.

C. The Reviewing Court Has Authority to Reverse the Judgment or to Reduce the Award Where the Award Given Is so Excessive as to Make It Appear to Have Been Given as a Result of Passion or Prejudice.

The extent and limitations upon the power of the reviewing court to relieve the defendant from an excessive judgment are well recognized and are expressed by the California Supreme Court in the previously cited case of *Bellman v. San Francisco H. S. Dist.*, 11 Cal. (2d) 576, 586, 81 P. (2d) 894, 899, as follows:

> ". . . the power of this court to relieve a defendant from a judgment for damages in an amount so plainly and outrageously excessive as to indicate that it was arrived at as the result of passion or prejudice has often been recognized and exercised (citing). The measure of damages in an action for personal injuries is the amount which will compensate for all the detriment proximately caused by the negligence of the defendant (citing). Damages must in all cases be reasonable (citing) but what is a reasonable amount is a question upon which there may legitimately be a wide difference of opinion. Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock a sense of justice and raise the

presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts (citing)." (11 Cal. (2d) 576, 586, 81 P. (2d) 894, 899.)

D. The Award in the Case at Bar Is Similar on Its Facts to Awards in Other Cases Which Have Been Held to Be so Excessive as to Indicate They Were the Result of Passion or Prejudice.

While every case must, of course, be considered by itself, some guidance can be obtained from the action of other courts in analogous situations. In the present analysis we are considering an award for past pain and discomfort of relatively brief duration. As pointed out previously there was no evidence that Respondent would suffer pain in the future.

Respondent's verdict being based on the theory of compensation for pain, a very instructive case is *Hallinan v. Prindle,* 17 Cal. App. (2d) 656, 62 P. (2d) 1075 (hearing denied by California Supreme Court). In that case a physician, through the negligence of his assistant, injected formalin instead of novocain into plaintiff, preparatory to a minor operation to remove a cyst. Plaintiff testified to his pain as follows:

> "There was a terrible burning sensation and I screamed with pain and was in terrible agony. After several further injections the pain stopped. . . . I was in the hospital five or six days and for three or four months thereafter Dr. Prindle treated me. The swelling had burst and the wound had broken down . . . and every day he would cut around the wound and bandage it. The treatment was painful at all times. . . ." (17 Cal. App. (2d) 656, 670-671, 62 P. (2d) 1075, 1082.)

There was also evidence that the injury interfered with plaintiff's matrimonial intercourse. The jury returned a verdict for $12,500 which the Appellate Court abated by $5,000. The Court stated:

> "In the case at bar, as we have seen, there was no loss of earning capacity, and the verdict is based upon acute, but brief, pain at the time of the injection of the formalin solution, some pain accompanying the treatment, and the effect of the operation upon the plaintiff's matrimonial relations, as testified to by him. *The first two of these elements would of course be compensated by the recovery of a comparatively trifling sum, and the main ground of the verdict must be the third.*" (Italics ours.)
>
> 17 Cal. App. (2d) 656, 673, 62 P. (2d) 1075, 1083.

It should be noted that the painful treatment, in the *Hallinan* case lasted three or four months. In the case at bar Respondent, as previously pointed out, testified the last time he felt pain was about 12 days after his doctor removed the piece of ear mold. For severe, brief, pain and intermittent pain over several months the Court in the *Hallinan case, supra,* stated that the plaintiff "would of course be compensated by the recovery of a comparatively trifling sum." (The permanent interference with matrimonial intercourse was the ground on which almost all the award, as reduced, was supported.)

In *Davis v. Renton,* 99 Cal. App. 264, 278 Pac. 442 (hearing denied by California Supreme Court), the plaintiff was knocked down by a moving automobile. Her injuries included concussion of the brain, dizziness, loss of memory, fracture of left thumb with possible 50% loss of

motion, pain, bruises, and strains. Some of these symptoms extended until the time of trial. It seems evident that these injuries were much more serious than those of Respondent in the present case. A judgment for $5,000 was reversed as excessive.

In *Aspe v. Pirrelli,* 204 Cal. 9, 10, 266 Pac. 276, a judgment of $2,500 for shock, fear, and injured nerves as a result of an automobile collision was reversed because the Court was "convinced that the full amount of the award is not, as a matter of law, supported by the evidence."

In *Steinbrun v. Smith,* 123 Cal. App. 697, 11 P. (2d) 868, the plaintiff was injured in an automobile accident.

> "Plaintiff testified to the following personal injuries: Two scalp wounds; badly crushed thumb; right index finger cut and bruised; cut on left leg below knee and on right knee; was sore all over; elbow sore; every muscle in his body ached; immediately after the accident he went to the hospital where he was treated by a physician, without remaining all night; thereafter called at the physician's office every day for a week, and thereafter every two or three days for about three weeks. He testified that he went to the scene of the accident on the first and second days after the accident and took measurements and photographs and returned to work on the morning of the third day, as a motorman engineer for the Northwestern Pacific Railroad Company; he further testified that the index finger on his right hand was still sore and painful; that all the physician did was to apply mercurochrome and bind up the cuts and that they healed within three weeks."
>
> 123 Cal. App. 697, 698-699, 11 P. (2d) 868, 869.

In that case a judgment of $1,500, which included $315.05 special damages, was reduced by the trial court to $1,200. The Appellate Court further reduced the judgment to $900. Since there were $315.05 special damages this reduced the award for general damages to $585.95.

It seems to Appellant that the *Steinbrun* case is closely analogous to the case at bar. Where, as in the case at bar, the evidence shows no permanent injuries, awards for pain and inconvenience should be moderate. A large award, when the Court is satisfied that the injury is not serious, shocks the sense of justice of the Court. It indicates passion and prejudice. The foregoing authorities are analogous to the facts of the case at bar because in the awards there considered, as here, the period of pain was of relatively short duration, and no permanent injury was shown. An award of a substantial verdict below was held in such analogous cases to shock the sense of justice of the Court.

III.

Conclusion.

The error of the trial court in submitting the question of future pain to the jury and in instructing them that they could award Respondent damages for the physical pain he was reasonably certain to suffer in the future has resulted in a verdict not based, as it should have been, solely on the discomfort Respondent had suffered in the past. As shown under point II of our argument, the award of $3,000 is excessive for the insubstantial injury Respondent received.

It is difficult to see how, in the facts of the present case, the erroneous submission to the jury of the question of

future pain and the erroneous instruction that the jury could award damages for future pain, when such submission and instruction were not warranted by the evidence, could fail to be prejudicial. Such error has uniformly been accompanied in other cases either by a reduction of the judgment by the Appellate Court or by a reversal of the judgment. In the previously cited case of *Bellman v. San Francisco H. S. Dist.,* 11 Cal. (2d) 576, 81 P. (2d) 894, the Supreme Court held the evidence of future detriment was insufficient because such detriment was not "reasonably certain" and ordered a $15,000 judgment reversed unless Respondent should consent to remit $10,000 thereof. This was a reduction of two-thirds. In the previously cited case of *Steinbrun v. Smith,* 123 Cal. App. 697, 11 P. (2d) 868, where there was also an erroneous instruction the jury could award damages for future detriment the Court reduced the judgment from $1200 to $900 which (deducting $315.05 special damages) reduced the amount awarded as general damages from $885.95 to $585.95. That was a reduction of more than one-third. In the case of *Clark v. Huddleston,* 50 Cal. App. (2d) 311, 122 P. (2d) 952 (hearing denied by California Supreme Court), the Court considered the evidence of future detriment to be insufficient and reversed the judgment on the issue of damages. In the previously cited case of *Silvester v. Scanlan,* 136 Cal. App. 107, 111, 28 P. (2d) 97, 99 (hearing denied by California Supreme Court), involving the giving of an instruction authorizing an award for future detriment when the evidence did not justify such an instruction, the Court held:

> "By reason of the giving of the instructions referred to, it is impossible to say what portion of the verdict was given to plaintiff for her slight physical

injury and subsequent alleged suffering and what portion represented prospective damages for mental ailments that might or might not be suffered in the future.

For the reasons given the judgment is reversed."

In the case at bar, it is impossible to determine how much of the $3,000 general damages were awarded Respondent for his slight physical injury and subsequent temporary pain and how much represented prospective damages for pain to be suffered in the future, which prospective damages, as previously pointed out, were entirely unsupported in the case at bar.

The judgment should be reversed or, as a condition to affirmance in view of the error in the instructions and the excessive award, the judgment, in Appellant's opinion, should be reduced to $1,000.

Respectfully submitted,

JOHN L. WHEELER,
JOHN G. SOBIESKI,
Attorneys for Appellant, Sears, Roebuck & Co.

No. 11399

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a corporation,

Appellant,

vs.

FRED HARTLEY,

Appellee.

APPELLEE'S BRIEF.

CHASE, ROTCHFORD, DOWNEN & CHASE,
formerly
CHASE, BARNES & CHASE, and
ROBT. E. MOORE, JR.,
610 Title Insurance Building, Los Angeles 13,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The jurisdictional phase of the within appeal has been stated by Appellant with substantial correctness and, for that reason, Appellee makes no further statement in that regard.

Statement of the Case.

Appellant's appeal is from a judgment on a verdict of $3,000 general damages, $23 special damages and $63.60 costs in favor of Appellee and against Appellant [pp. 26-28]. (All page references herein are to the printed Transcript of Record.) The actual medical expenses of the Appellee, however, were $45 for Dr. Ghrist, $24 for

the hospital, $20 for the anesthetist and $2 for medicines, or a total of $91.00 [pp. 54, 105-107].

The facts out of which the case arose are as follows: Prior to October 13, 1945, Appellee, when alone with his wife at home, would take off the hearing aid worn by him, and his wife could make him hear her by shouting and talking loud. She could be in the same room with him or just step into the next room and talk in a loud voice, and Appellee would hear her [p. 43].

In the course of Appellee's purchase, on October 13, 1945, of a new Zenith hearing aid from Appellant [pp. 32, 35-38], an employee of Appellant left in Appellee's left ear, in the inner third of the ear canal, a white, hard mass identified by Dr. Ghrist as a "plaster of Paris" like substance [p. 84]. It felt like a "stone wall" to Appellee [p. 46] but he endured the pain from Saturday, October 13, 1945, until Monday, October 15, 1945 [pp. 44-47]. On October 15, Dr. Ghrist tried for over one-half hour to remove the substance in his office but could not get a grasp on it [pp. 47, 85]. After further "digging" by the doctor, until Appellee "broke down" from the pain [p. 48], Appellee was sent home. He went to the Physicians and Surgeons Hospital in Glendale on October 16, 1945 [pp. 48, 86]. Appellee suffered "exquisite pain" [p. 85] prior to the removal of the substance from his ear. This removal was under an anesthetic and took about 45 minutes [p. 86]. Although there was no hole in the eardrum, there was a severe inflamation and the mem-

branes began to "swell" after the removal of the substance [p. 87].

On October 19, 1945, Dr. Ghrist saw Appellee, who was dizzy and sick and the doctor gave sulfadiazene, the eardrum being quite red and swollen and the inner third of the ear canal being "extremely swollen" [pp. 87-88]. Dr. Ghrist saw Appellee again on October 22nd, October 29th, November 2nd, and November 9th, 1945 [p. 88]. While the reddened, inflamed condition lasted, said condition was accompanied by severe pain [p. 89]. After his last visit to Dr. Ghrist, Appellee continued to have an annoying feeling over the left ear "like a fly" bothering him all the time. This lasted until within five to six weeks of the date of the trial, to-wit, May 8, 1946 [pp. 31, 55]. It was the opinion of Dr. Ghrist that there could be a relationship between this sensation and the ear condition treated by him [pp. 101-102]. Appellee's wife observed the discomfort suffered by Appellee from the drainage from his ear following his return from the hospital and the miserable headaches that required Appellee to keep taking aspirins [pp. 111-112]. She also noticed "a big difference" in Appellee's hearing after the injury to his ear and more particularly his inability to hear her in the same room [pp. 112-113]. Appellee's nervous condition and the profound effect of his experience were evidenced at the trial by the shedding of tears, Appellant's counsel examining Appellee in an effort to cast doubt on the sincerity of Appellee's actions in this regard [p. 104].

Questions at Issue.

The questions involved on this appeal are four:

1. Was it error for the Trial Court to instruct the jury that it could consider, as an "element" of damage, the "phsical pain, if any, which he (Appellee) has suffered * * *, or which he is reasonably certain to suffer in the future" in view of the further instruction informing the jury that they were *not* permitted "to award * * * speculative damages" *i. e.*, "compensation for prospective detriment which, although possible, is remote, conjectural or speculative" [p. 203]. (Italics ours.)

2. Was not the instruction re damages, as given, *less* favorable to Appellee than the provisions of Civil Code Section 3283 warranted?

3. Is not Appellee entitled to the benefits of the presumption that the jury in assessing damages, was actuated by pure motives and followed the instructions of the Trial Court?

4. Was not the verdict amply supported by the evidence as to damages?

ARGUMENT.

I.

The District Court Did Not Err in Its Instruction re General Damages.

A. The Law Is Well Settled That If a Jury Is Not Misled by an Instruction, No Error Can Be Predicated Upon the Giving of Such Instruction.

In this case the Trial Court, after paraphrasing the provisions of Section 3283 of the California Civil Code, further instructed the jury that it was not permitted to award the plaintiff speculative damages "by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative." If the general instruction had been misleading (and we submit it had not for reasons hereafter stated), this further instruction definitely forestalled speculation and conjecture on behalf of the jury.

Dougherty v. Ellingson, 97 Cal. App. 87, 96.

It would not be proper for the reviewing Court to take one isolated instruction and consider it alone, separate and apart from the other instructions given. Instructions must be considered in their entirety and if, when so considered, they state the law of a case fairly and clearly, then they are, as a whole, unobjectionable even though some isolated passages from a single instruction are amenable to criticism.

Los Angeles County Flood Control District v. Abbot, 24 Cal. App. (2d) 728, 739, 740.

B. The Cases, Cited by Appellant as Controlling, Are Distinguishable From the Case at Bar.

The decision in the case of *Silvester v. Scanlan,* 136 Cal. App. 107, is based, in part, on the determination by the Court that it was "not claimed that plaintiff suffered any substantial physical injuries," that the instruction referred to the reasonable expectation of future "mental worry," and that there was no evidence of probable future consequences. In the present case (1) it *was claimed* and proven that plaintiff did suffer substantial physical injuries, to-wit, "exquisite pain" from an inflamed and swollen ear canal and drum, and (2) the instruction given, while not referring to "mental worry" (a "detriment" contemplated by Civil Code, Section 3283), does encompass probable future consequences, namely, those in this brief hereafter specified.

The case of *Bellman v. San Francisco High School District*, 11 Cal. (2d) 576, cites the *Silvester* case merely for the proposition that no compensation may be awarded for future damages unless they are reasonably certain to occur. It *does not* support the rigid rule that Appellant would attempt to impose upon the giving of "damage instructions."

The same observation and objection can be, and is hereby, made to the use by Appellant of the *Caminetti* case (*Caminetti v. Pacific Mutual Life Ins. Co.*, 23 Cal. (2d) 94), where the *Bellman* case (not the *Silvester* case) is approved on the general subject of future damages *and not on any question of purported error in instructions.*

C. There Was Evidence From Which the Jury Was Entitled to Find That Appellee Was "Reasonably Certain" to Suffer Pain in the Future.

Appellant in its opening brief has adequately covered the treatment of Appellee by Dr. Ghrist, Appellee's attending physician, *with the important exception* that Appellant fails to refer to the extreme difficulties which the doctor experienced trying to remove the "plaster of Paris" like substance from Appellee's left ear [pp. 47-48, 85-86]. Appellant also omits to mention the suffering by Appellee of "exquisite pain" [p. 85] prior to the removal of the substance from his ear. The removal was done under an anesthetic and took about forty-five minutes, and upon such removal Dr. Ghrist discovered that, although there was no hole in the eardrum, there was a severe amount of inflamation and the membranes of the ear began to swell after the removal of the substance [pp. 86-87]. Thereafter, on October 19, 1945, six (6) days after the injury to Appellee, he was dizzy and sick, and was given sulfadiazene for the infection in his ear [pp. 87-88]. While it is true that the appearance of the ear was sufficiently good on November 9, 1945, to result in the discharge of the Appellee by Dr. Ghrist, Appellee continued to have an annoying feeling over the left ear "like a fly" bothering him all the time, which feeling was last noticed by Appellee within five or six weeks of May 8, 1946, the date of the trial [pp. 31, 55]. Appellee's wife observed the discomfort suf-

fered by the Appellee from the drainage from his ear during the period of treatments by Dr. Ghrist, and the miserable headaches therefrom which required the taking of aspirins [pp. 111-112]. Appellee's wife also noticed "a big difference" in Appellee's hearing after the injury to his ear [pp. 112-113]. Appellee's nervous condition and the profound effect of his experience were evidenced at the trial and were quite apparent to the Court and jury; in fact, so much so, that Appellant's counsel examined Appellee in an effort to cast doubt in the jury's mind as to the sincerity of Appellee's crying on the stand [p. 104].

As hereinafter in this brief pointed out, the provisions of Section 3283 of the Civil Code do not limit the consideration of damages to mere "pain" as such, but extend such consideration to the "detriment" which is reasonably certain to occur in the future. From the facts above related, it is obvious that the jury was not only entitled to consider future headaches which might be reasonably certain to result from the aforementioned injury, but also the reasonable certainty of "future detriment" such as the continuance of the nervous condition referred to and demonstrated by Appellee, and the acceleration of Appellee's continued loss of hearing.

II.

The Instruction re Damages as Given by the Trial Court, Was Less Favorable to Appellee Than the Provisions of Civil Code Section 3283 Warranted.

Section 3283 of the California Civil Code provides "Damages may be awarded * * * for *detriment* * * * certain to result in the future." (Italics ours.) In *Lang v. Barry,* 71 Cal. App. (2d) 121, the rule is stated that the "detriment" for which damages can be awarded "is not limited to impairment of earning capacity or pain." Thus we see that the Trial Court in this case gave to the jury a more restrictive instruction than would have been justified by the aforementioned Code section.

It has frequently been held that a "nervous condition" is properly an element of damages to be submitted to the jury. (*Johnson v. Pearson*, 100 Cal. App. 503, 506, 508.)

III.

Appellee Is Entitled to the Benefits of the Presumption That the Trial Jury Was Actuated by Pure Motives in Reaching Its Verdict and That It Followed the Instructions of the Trial Court.

From a very early date, the California Courts have favored the presumption that a jury, in rendering its verdict, was actuated by the purest motives. (*Scally v. W. T. Garratt & Co.,* 11 Cal. App. 138, 146, 147.) The jury is treated as a favorite and almost sacred tribunal in valuing the injury and in awarding compensation therefor. (*Eldridge v. Clock & Henery Const. Co.*, 75 Cal. App. 516, 536.) Where the instructions admonish the jury to award only such damages as plaintiff proves he has sustained, it cannot be assumed (*Anderson v. Freis,*

61 Cal. App. (2d) 159, 166) that the jury will include in its award "any sums for elements of damage which plaintiff has not proved that he * * * sustained." It has been pointed out by our Appellate Courts that, by reason of the very uncertainties of the situation, the segregation of the elements combining to form the full measure of damages and the assessing of damages therefrom call for a "wide latitude" and an "elastic discretion" in the jury's deliberations. (*Taylor v. Pole,* 16 Cal. (2d) 668, 672, 673.)

IV.

The Verdict Was and Is Amply Supported by the Evidence as to Damages.

A. There Was Evidence as to Future Detriment, Including Pain.

We have previously demonstrated under Point I, that there was and is considerable evidence as to future detriment to Appellee, including "pain."

However, in considering the verdict of the jury to determine the alleged existence of "passion and prejudice," the Appellate Court should give substantial consideration to the detriment suffered by Appellee *prior to the trial of the case.*

B. The Evidence Shows That the Injury and Pain Suffered by Appellee Prior to the Trial Were Substantial.

As pointed out by Appellant, Appellee prior to October 13, 1945, had been suffering a gradual loss of hearing over a period of years [pp. 59-60]. However, prior to the injury in question, Appellee had been able to remove his hearing aid at home and still hear his wife when she talked in a loud voice in the next room [p. 43]. After

the injury Appellee's wife noticed a "big difference" in his ability to hear her [pp. 112-113]. Appellee endured the pain, described by his doctor as "exquisite" [p. 85], over the weekend following the 13th of October [pp. 44-47]. The doctor was unable to remove the plaster-like substance in his office after much "digging" and Appellee "broke down" from the pain [pp. 47-48, 85]. The operation on October 16, 1945, was under an anesthetic and took 45 minutes [p. 86]. The eardrum and ear canal were inflamed and swollen and this condition lasted several days and was accompanied by severe pain. [pp. 87-89]. We have already referred in Point I to Appellee's headaches, the drainage of his ear and the nervous condition of Appellee evidenced by his tears in Court. As pointed out by the Trial Court, at the time of the denial of Appellant's Motion for a New Trial, can it be said that there is any doubt that Appellee suffered physical pain to a considerable degree, in fact, excruciating pain in a region of the body where pain is known to be acute? The relative shortness of the period during which medical care was necessary and the fact that lost time from work was at a minimum do not of themselves determine the sole bases of and for the jury's appraisal of pain and suffering. Appellant pointed out that Appellee was a *foreman of a die shop* [p. 59]. Not only does this fact explain why there was so little lost time from work, but it also demonstrates the acute nature of the pain and suffering, that is, pain sufficient to cause tears in the eyes of Appellee (a man used to hard and rough work) at the thought thereof even after several months had elapsed since the date of the injury. The mere fact that after November 9, 1945, Appellee showed few objective signs of injury, does not support the conclusion that the verdict of the jury was "excessive." "Medical

science and human experience teach us that the extent of personal injuries cannot be measured solely by objective signs" and that an injury to the nervous system "may result in far greater and more lasting pain and disability than do many types of injuries which are plainly visible." (*Coleman v. Galvin*, 66 Cal. App. (2d) 303, 305.)

C. Substantial Limitations Are Placed by the Appellate Courts in California Upon the Power of Said Courts to Reverse a Verdict of the Trial Court Jury, Particularly Where the Trial Court Has Thereafter Denied a Motion for a New Trial.

In order to justify the Appellate Court in reversing an order denying a new trial or in reducing the verdict there must be a showing that the verdict is so disproportionate to *any* reasonable view of the evidence as to raise a strong presumption that it is based on prejudice or passion. (*Koyer v. McComber*, 12 Cal. (2d) 175, 182; *Loper v. Morrison*, 23 Cal. (2d) 600, 610.)

The Appellate Court may not set aside an award of damages as excessive merely because the opinion of the Court is at variance with that of the jurors. (*Williams v. Layne*, 53 Cal. App. (2d) 81, 86; *Stanhope v. L. A. College of Chiropractic*, 54 Cal. App. (2d) 141, 148.) The trial judge here appraised the damages on the Motion for a New Trial after the verdict of the jury and the Appellate Court should not disturb the verdict where the amount is not so "flagrantly outrageous and extravagant as to immediately suggest that it is the product of passion, prejudice or corruption rather than the fair judgment of an informed and reasonable being." (*Flanton v. Greenfield*, 56 Cal. App. (2d) 253, 254.)

D. The Error, If Any, Herein Was Not So Prejudicial as to Require, Under the Provisions of Article VI, Section 4½ of the California Constitution, a Reversal of the Judgment, nor the Reduction of the Verdict.

Since the Trial Court gave its modifying instruction emphasizing the impropriety of awarding "speculative damages" for future detriment and, since it cannot be reasonably said that the amount of the verdict is "excessive" under all the facts of the case, no reversible error (if any error there be, which we strongly deny) has occurred and the verdict, and judgment thereon, should be affirmed under the provisions of Article VI, Section 4½ of the California Constitution. (*Hughes v. Duncan,* 114 Cal. App. 576, 578; *Candini v. Hiatt,* 9 Cal. App. (2d) 679, 685, 686.)

Conclusion.

Having clearly demonstrated that the verdict of the Trial Jury was not excessive under all the facts of the case and that the Trial Court did not err in the giving of its instructions, we respectfully submit that the verdict of said Trial Jury, the judgment thereon, and the ruling of the Trial Court, denying Appellant's Motion for a New Trial, and each and all of them, should be affirmed and upheld by your Honorable Court.

Respectfully submitted,

Chase, Rotchford, Downen & Chase,
formerly
Chase, Barnes & Chase, and
Robt. E. Moore, Jr.,
Attorneys for Appellee.

No. 11399.

IN THE

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APPELLANT'S REPLY BRIEF.

JOHN L. WHEELER,
JOHN G. SOBIESKI,
1241 Pacific Mutual Building, Los Angeles 14,
Attorneys for Appellant Sears Roebuck & Co.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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APPELLANT'S REPLY BRIEF.

Introduction.

The contention in Appellee's Brief (pp. 7 and 8) that there was evidence from which the jury could find that respondent was "reasonably certain" to suffer pain in the future goes to the vital issue in this appeal. We will show hereafter that such contention cannot be sustained. The various authorities cited by Appellee are cases which are not analogous to the facts in this appeal and, as will be pointed out hereafter, the principles they announce do not conflict with the controlling authorities cited in our opening brief.

I.

There Was No Evidence That Appellee Was Reasonably Certain to Suffer Future Pain.

Appellee's alleged evidence of future pain is as follows (Appellee's Br. pp. 7 and 8):

The physician had difficulty removing the plaster of paris without an anesthetic and appellee suffered "exquisite pain" at that time—(6½ months prior to trial); that on October 19, 1945 (6½ months prior to trial) Appellee felt sick and dizzy; that his wife (at a time 6½ months before trial) observed his discomfort and headaches; that his subjective feeling like a fly bothering him lasted until 5 or 6 weeks before trial; that his wife noticed a "big difference" in Appellee's hearing after the accident; and, finally, that Appellee cried on the stand while telling his story to the jury.

Such is the evidence which Appellee claims meets the requirements of the California law of establishing "with reasonable certainty" that Appellee will suffer future pain.

Such evidence utterly fails to meet the standard of reasonable certainty established in the *Silvester* and *Bellman* cases, cited in Appellant's opening brief:

> "To entitle a plaintiff to recover present damages for apprehended future consequences, *there must be evidence to show such a degree of probability as amounts to a reasonable certainty* that they will result from the original injury." (Italics ours.)
>
> *Silvester v. Scanlan*, 136 Cal. App. 107, 111, 28 P. (2d) 97, 99.

"By this section (C. C. 3283) in an action for personal injuries recovery is limited so far as physical suffering, or pain, or mental anguish is concerned, to compensation for the consequences which have occurred up to the time of trial, or it is *reasonably certain* under the evidence will follow in the future (citing). *The jury may not consider consequences which are only likely to occur.*" (Italics ours.)

Bellman v. San Francisco H. S. Dist., 11 Cal. (2d) 576, 588, 81 P. (2d) 894, 900.

Appellee in his brief attempts to make much of the fact that Appellee wept on the stand when describing his pain some 6½ months previously. In a brief of some 13 pages, Appellee describes that incident on pages 3, 8, and 11. The motives which caused Appellee to weep on the stand are necessarily buried in his own breast. It seems fair comment, however, to point out that Appellee admitted that when Appellee gave his deposition at an earlier date, he testified about his earlier pain without crying (p. 104). The record consequently shows that, by itself, the recollection of the doctor's treatment was insufficient to make Appellee cry. The additional element of the presence of a jury was also required. Recollection of past pain cannot support an award for future pain under Section 3283 of the California Civil Code nor, in the light of the record of this case can tears on the witness stand support a claim of an existing or future nervous disorder. The fact that counsel for Appellee in his search for future pain has to grasp at such a straw as this shows the utter lack of substantial evidence to support the submission to the jury of the question of future pain.

Appellee also asserts that this accident accelerated the impairment of Appellee's hearing, apparently basing such

claim on the testimony of Appellee's wife that she noticed a "big difference" in Appellee's hearing after the accident (Brief p. 8). Such subjective testimony does not sustain Appellee's contention that the accident accelerated Appellee's deafness. Appellee's doctor testified that there was no damage to the eardrum except inflammation which cleared in a few days (pp. 96-97). Both physicians testified that Appellee's deafness was caused by catarrh (a nasal condition (pp. 99-100, 174). Both doctors testified that the condition of the hearing nerve was excellent and that the condition was the same for both ears. Both doctors testified that Appellee's hearing was approximately equal in both ears, that his condition was conduction deafness attributable to catarrh, that this is a progressive condition with increasing loss of hearing (pp. 98-100, 172-174). Appellee testified that his hearing became worse over a period of years (pp. 59-64). There was no evidence that this condition was in any way affected, or could be affected, by the temporary presence of plaster of paris on the outside of the eardrum. Had there been a possibility that the accident could have accelerated the impairment of Appellee's hearing it is obvious that Appellee's attending physician, a specialist, would have testified concerning it.

In view of such facts the testimony of Mrs. Hartley that she noticed a "big difference" in Appellee's hearing after the accident is no evidence that the accident caused any impairment of Appellee's hearing. The fallacy of the argument of *"post hoc ergo quod hoc"* has been demonstrated many times. The evidence is uncontradicted that the cause of Appellee's deafness was catarrhal and that it was progressive in character. This fully accounts for the general condition which Mrs. Hartley observed.

The foregoing review of the contentions advanced by Appellee shows that there was no evidence that Appellee was "reasonably certain" to suffer future pain. As pointed out in the *Bellman* case, surmise and conjecture are insufficient to support an award for future pain. "The jury may not consider consequences which are only likely to occur." (11 Cal. (2d) 576, 588, 81 P. (2d) 894, 900.)

II.

The Authorities Cited by Appellee Do Not Justify Affirmance or Conflict With the Controlling Authorities Cited in Appellant's Opening Brief.

A brief analysis of the cases cited by Appellee will show their inapplicability to this appeal.

The case of *Dougherty v. Ellingson,* 97 Cal. App. 87, 275 Pac. 456, cited on page 5 of Appellee's brief, was an action for negligence. Unlike the case at bar, there was no contention in that case that there was no evidence to support an award for future pain and suffering. The contention there made was that the phrasing of the instruction permitted the jury to "consider future pain and suffering irrespective of whether such pain produced damage." (275 Pac. 460.) The Court said it was "highly improbable" that the instruction misled the jury but the jury in any event could not have been misled in view of the following instruction to "award only such damages as she has proved she sustained together with what she is reasonably certain to suffer in the future" (p. 460). Since in the *Dougherty* case there was no claim of an absence of evidence of future pain it is obvious that it is inapplicable here.

L. A. County Flood Control Dist. v. Abbot, 24 Cal. App. (2d) 728, 76 P. (2d) 188, cited on page 5 of Appellee's brief, involved an eminent domain proceeding. It states the familiar rule that instructions are to be considered as a whole.

Long v. Barry, 71 Cal. App. (2d) 121, 161 P. (2d) 949, cited on page 9 of Appellee's brief, involved an injury of a pedestrian by an automobile. An instruction authorizing an award for future detriment was upheld because the Court found there was evidence from which the jury could find that the accident caused permanent injuries to the Plaintiff. Such a case has no application here where evidence of permanent injury or future pain is entirely lacking.

Johnson v. Pearson, 100 Cal. App. 503, 280 Pac. 394, cited on page 9 of Appellee's brief, involved a very serious accident in which the Plaintiff, as a result of the automobile collision, was thrown through the glass window of the automobile, sustaining many serious injuries. "The lumbar region of the spine was bruised, contused, and so sprained as to cause an impingement of the nerves in the locale spine. She also received a severe nervous shock. . . ." (285 Pac. 395.) Appellant there claimed that the instruction given regarding future damages was unsupported by the evidence. The Court said "This contention is likewise without merit. There is abundant evidence in the record from which the jury might well have concluded that Respondent's nervous condition would be permanent." (p. 396). Manifestly there was something more than tears on the witness stand before the reviewing court in affirming the judgment.

Scally v. Garratt & Co., 11 Cal. App. 138, 104 Pac. 325, involved a minor boy whose arm had been badly chopped up by dangerous machinery in a foundry where he had been employed in violation of the law prohibiting such employment of minors. An instruction authorizing damages for future pain and suffering was upheld. In addition to very serious injuries to the boy's hand, arm, and muscles, including atrophy of the right arm and hand, two physicians testified that "during the remainder of his life he would in all probability continue to suffer pain from said injuries." (p. 328.) In view of such overwhelming evidence of future detriment the *Scally* case is clearly inapplicable to the case at bar. An award for future damages in the *Scally* case obviously was justified.

Eldredge v. Clark Co., 75 Cal. App. 516, 243 Pac. 43, cited on page 9 of Appellee's brief; involved a fall by plaintiff into a hole made by a paving contractor. She suffered various injuries including an impacted fracture of the large bone in her right wrist. At the time of trial she still had some limitation of motion, together with pain and suffering, and "her earning power was to some extent permanently diminished." An award of $1500 was upheld. With the permanency of her injuries established it is obvious that such case has no application to the facts at bar.

Anderson v. Freis, 61 Cal. App. (2d) 159, 142 P. (2d) 330, cited on pages 9-10 of Appellee's brief, involved a three car collision with a complaint and a cross-complaint against the third party. No question of future detriment was involved. The Court had given intsructions on elements of damage which included damage to the automobiles and damage by reason of loss of time and expense

of medical and hospital care. Appellant claimed there was no evidence or that the evidence was lacking in figures so the jury had no basis for computing plaintiff's loss as to these items. Inasmuch as a three way collision was involved with Plaintiff receiving an award of $12,500 damages it would appear that appellant's contention in fact was not that there was no evidence of damages but rather that there were no specific figures from which the award of damage as to these items could be determined. The appellate court stated that there was no prejudicial error because the instructions were given to cover items of damage which both parties claimed in their respective actions.

Taylor v. Pole, 16 Cal. (2d) 688, 107 P. (2d) 614, cited on page 10 of Appellee's brief, involved the question of aggravation of a pre-existing condition. The evidence showed plaintiff (Mrs. Taylor) "was severely injuried in the accident." (p. 615.) "Some of these injuries, particularly those to the leg and foot, were expected to be permanent." "The medical experts for the defendants expressed the opinion that the condition was due to severance of the personal nerve or muscle at the point of laceration . . ." (p. 615). The judgment was reversed because the jury had been instructed that unless there was testimony from which they could determine how much of plaintiff's present condition was due to pre-existing condition and how much was due to aggravation the plaintiff had failed to prove her case and the issue should be resolved against plaintiff. The Court held such instruction too strict and the Court used the language quoted in Appellee's brief that the jury has a "wide latitude" and "elastic discretion" in determining the amount of damage. Such elasticity, however, was applied in a case where the

Court found the plaintiff was "severely injured" and some of the injuries "were expected to be permanent." (p. 615.) Hence the language is inapplicable to the case at bar where, as pointed out, there is no evidence Appellee will suffer future pain.

Coleman v. Galvin, 66 Cal. App. (2d) 303, 152 P. (2d) 39, cited on page 12 of Appellee's brief, to the point that injury to the nervous system may result in lasting disability involved a serious head-on automobile collision. Plaintiff sustained a concussion of the brain and "severe nervous shock." After the accident his entire personality changed. His injuries were "serious and permanent in nature." Such a case is not analogous to the present case where there is no evidence of permanent injury.

Koyer v. McComber, 12 Cal. (2d) 175, 82 P. (2d) 941, cited by Appellee on page 12 on the consideration to be given by an appellate court to the jury's verdict, was an action to rescind a land purchase for fraud. The facts are unrelated to the case at bar.

Loper v. Morrison, 23 Cal. (2d) 600, 145 P. (2d) 1, cited by Appellee on the same point, involved an automobile accident which caused plaintiff to be hospitalized for 26 days. An instruction on future damages was upheld because "at the time of trial plaintiff still was suffering from headaches, nervousness, and pain. This evidence tended to prove future damages and was sufficient to justify the instruction." Such pain, continuing till the time of trial, can be presumed to continue and hence is

evidence of future pain. In the case at bar, however, the last time plaintiff suffered pain was 6 months prior to trial. Hence the cited case is based on inapplicable facts.

In *Williams v. Layne*, 53 Cal. App. (2d) 81, 127 P. (2d) 582, cited by Appellee on page 12 on the same general point, the plaintiff at the time of trial was still incapacitated and could accept no employment. There was therefore ample evidence of damages continuing in the future. Such case is inapplicable to the case at bar where Appellee's physician discharged him as normal 6 months prior to trial and Appellee lost no work whatever.

Stanhope v. L. A. College of Chiropratic, 54 Cal. App. (2d) 141, 128 P. (2d) 705, cited on page 12 of Appellee's brief on the same point, was a malpractice action based on a faulty diagnosis. The plaintiff had a broken back. The faulty diagnosis was abundantly proved and the evidence was that with proper treatment the patient should have returned to work in 6 months but following this improper treatment plaintiff was still convalescing at the time of trial, 1 year 8 months after trial. Such case is obviously not analogous to the case at bar.

Flanton v. Greenfield, 56 Cal. App. (2d) 253, 132 P. (2d) 64, cited by Appellee on page 12, involved an automobile accident in which a pregnant woman received injuries which subsequently caused a miscarriage. That was her first pregnancy. She suffered intense pain with various injuries including subsequent curretment of the

womb and was made weak and nervous. The action of the appellate court in affirming a judgment for $2500 was on facts entirely different from those in the case at bar. No question of future pain was discussed.

Hughes v. Duncan, 114 Cal. App. 576, 300 Pac. 147, cited on page 13 of Appellee's brief, was an action for damages arising from an auto collision. The opinion does not disclose the extent of plaintiff's injuries or the amount of the verdict. There was no claim made that plaintiff's injuries were not substantial nor permanent. No question of future pain was involved. Objection was made that an instruction that plaintiff under certain circumstances could recover for mental pain, mental suffering, and mental anguish was unsupported by the evidence. From the fact an accident happened and injuries were sustained it is obvious that some mental anguish, mental suffering and mental pain must have been endured. The Court said it would not stop to consider whether or not the evidence supported the instruction because the jury had been instructed to award damages only for such items as were proved. Such language was applicable to the record then before the Court, namely, some evidence from which the jury as reasonable man could conclude there had been mental anguish, mental suffering, and mental pain. Such case is inapplicable to the case at bar which involves future pain and in which there was no evidence of future pain.

Candini v. Hiatt, 9 Cal. App. (2d) 679, 50 P. (2d) 843, the final case cited by Appellee, involved a damage

action by a young woman passenger in an automobile against the driver on account of his willful misconduct which resulted in the car overturning while rounding a curve at a high rate of speed. The uncontradicted evidence of her injuries was that her physical condition, as a result of her injuries, was extremely serious, painful and humiliating; several of her major injuries were permanent.

The Court stated the instruction authorizing an award for future medical expenses was erroneous because there was no evidence that she would incur future liability to pay any definite sum. It was clear that some medical expense would be incurred because another operation was necessary. The Court held the instruction was not reversible error because "the evidence, without substantial conflict, shows that the plaintiff was very seriously and permanently injured, and it may not be reasonably said the amount of the judgment is excessive if all question of future expense for medical care . . . is eliminated." (p. 846).

The facts of the *Candini* case are wholly unlike those of the case at bar. In the *Candini* case the injuries sustained were so severe and so permanent that the precise amount of the future medical expense became, relatively, insignificant. Such is not the fact here where, as we have shown, there is no evidence of future pain and the injuries sustained in the past, while regrettable were relatively minor.

III.

Appellee Has Failed in His Attempt to Distinguish the Controlling Authorities Cited in Our Opening Brief.

Appellee on page 6 of his brief attempts to distinguish the case of *Silvester v. Scanlan,* 136 Cal. App. 107, 28 P. (2d) 97 on the ground that in the *Silvester* case it "was not claimed that plaintiff suffered any substantial physical injuries." In the *Silvester* case a judgment was reversed because the Court instructed the jury they could make an award for future pain and suffering when there was no evidence such future pain and suffering was "reasonably certain." The injuries suffered by plaintiff in the *Silvester* case were described by the Court in part as follows:

> ". . . a portion of the gutter was dislodged from the roof by one of the painters and it fell to the street striking plaintiff a glancing blow . . . Plaintiff was dazed or rendered unconscious and taken to the Central Emergency Hospital . . . Plaintiff, as part of her case, introduced evidence to show that she was at times unable to do her housework or practically any work at all; that she suffered from fainting spells . . . that she could not walk any distance unassisted and could not completely dress or undress herself. There was also medical testimony to show that plaintiff was suffering from traumatic nervousness or nervousness following her slight physical injury. (28 P. (2d) 98.)

This damage to the plaintiff in the *Silvester* case is like the damage suffered by Appellee. When the physician was trying to remove the plaster of paris from Appellee's ear without an anesthetic, Appellee suffered "exquisite pain."

When plaintiff in the *Silvester* case was struck by the gutter she was rendered unconscious or dazed and taken to the emergency hospital. Appellee suffered pain and headaches for 12 or 13 days. Plaintiff in the *Silvester* case "suffered from fainting spells and had to be put to bed and on occasions remained there for 3 or 4 days at a time." (28 P. (2d) 98.) Her other injuries as described in the opinion were more serious than those of Appellee whose work sustained practically no interruption as a result of his accident and who was discharged by his physician as "normal" some three weeks after the accident [Tr. p. 88].

As pointed out in the case of *Hallinan v. Prindle*, 17 Cal. App. (2d) 656, 62 P. (2d) 1075, cited in our opening brief and not discussed by Appellee, acute but brief pain followed by some intermittent pain over a period of time is not considered a substantial injury. Consequently, on the facts, the injury to the plaintiff in the case at bar and in the *Silvester* case are considerably alike. Both plaintiffs went to the hospital. The incapacity suffered by the plaintiff in the *Silvester* case, involving fainting spells requiring her to remain in bed for several days, is certainly as severe as the headaches and pain in the ear suffered by Appellee for 12 days following the accident. The nervousness suffered by plaintiff in the *Silvester* case is as serious as the subjective sensation of a fly bothering Appellee's ear which he testified had ceased 5 or 6 weeks before trial and which he had never even mentioned to his physician. It is precisely to factual situations like the case at bar and the *Silvester* case where the unwarranted injection of an

award for possible future detriment is liable to puff up the verdict and hence is reversible error. The *Silvester* case is squarely in point on the facts and the law. The final words are particularly apt:

> "By reason of the giving of the instructions referred to, it is impossible to say what portion of the verdict was given to plaintiff for her slight physical injury and subsequent alleged suffering, and what portion represented prospective damages for mental ailments that might or might not be suffered in the future. For the reasons given, the judgment is reversed." (28 P. (2d) 99.)

Bellman v. San Francisco High School District, 11 Cal. (2d) 576, 81 P. (2d) 894, cited in our opening brief, is likewise squarely in point. That case quoted the *Silvester* case with approval. It is true, as both we and Appellee pointed out, that the Court there did not discuss the instructions given. But it is true, which Appellee ignores, that in the *Bellman* case the Supreme Court reduced a judgment by ⅔ because "the medical testimony fails to show any certainty of serious permanent injury." The award was reduced to compensate solely for the injuries plaintiff had suffered in the past.

The holding of such cases must be the law if effect is to be given to the provision of the Civil Code limiting damages to detriment suffered or "certain to result in the future." (Civ. Code, 3283.)

In exceptional cases, of course, where very severe damages were sustained and the element of future damages obviously played an insignificant part, the Courts can properly disregard an erroneous instruction on future damages. But in cases like the case at bar, where by comparing

the amount of the verdict with the extent of the past injuries, it is obvious that the erroneous submission of the question of future pain probably affected the size of the verdict, the judgment must be reversed or reduced. To fail to take such action would result in judicial nullification of the standard laid down by the Civil Code for the award of damages for future pain.

> "Even though an instruction is couched in proper language it is improper if it finds no support in the evidence, and the giving of it constitutes prejudicial error of it is calculated to mislead the jury."
>
> *Davenport v. Stratton,* 24 Cal. (2d) 232, 149 P. (2d) 4, 15.

Conclusion.

Although it is regrettable that Appellee suffered any pain at all, the evidence shows his pain was of relatively brief duration and he has fortunately suffered no permanent injuries. The trial court in acceding to Appellee's request and, over our objection, instructing the jury they could award damages for future pain, evidence to support such an award being absent, obviously misled the jury and prevented Appellee from having the judgment against it based on the actual detriment Appellee has suffered.

For the reasons set forth herein and in our opening brief the judgment should be reduced or reversed.

Respectfully submitted,

JOHN L. WHEELER,
JOHN G. SOBIESKI,
Attorneys for Appellant Sears Roebuck & Co.

No. 11400

United States
Circuit Court of Appeals
For the Ninth Circuit.

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,

Appellants,

vs.

JOHN C. WILKERSON,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Eastern District of Washington Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11400

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

NAT U. BROWN,

KENNETH C. HAWKINS,

Miller Building,

Yakima, Washington.

Attorneys for Appellee.

J. H. FELTON,

Moscow, Idaho.

BERNIECE BACHARACH,

Wenatchee, Washington.

Attorneys for Appellants.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 244.

MARTHA WOODS CORBETT,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

COMPLAINT

The plaintiff alleges:

I.

Jurisdiction founded on diversity of citizenship and amount. Plaintiff is a citizen of the State of Idaho, and defendant is a citizen of the State of Washington. The amount in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3000.00).

II.

On Sunday, September 9, 1945, on a public highway, called Highway No. 830, twenty-eight miles west of Goldendale, in the State of Washington, defendant negligently drove a motor vehicle against plaintiff, who was then walking on the edge of said highway.

III.

As a result plaintiff was thrown down, had her back broken and her leg severely injured, was prevented from transacting her business, suffered great

pain of body and mind, and [1*] incurred expenses for medical attention and hospitalization in the sum of Seven Hundred Twenty-five Dollars ($725.00).

Wherefore, plaintiff demands judgment against defendant in the sum of Twenty-five Thousand Dollars ($25,000.00) and costs.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Plaintiff.

Filed: Dec. 12, 1945. [2]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 245.

LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

COMPLAINT

The plaintiff alleges:

I.

Jurisdiction founded on diversity of citizenship

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* Page numbering appearing at foot of page of original certified Transcript of Record.

and amount. The plaintiff is a citizen of the State of Idaho, and defendant is a resident citizen of the State of Washington. The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3000.00).

II.

Plaintiff is the duly appointed, qualified and acting administratrix of the estate of Levi Frank, deceased.

III.

On Sunday, September 9, 1945, on a public highway called Highway No. 830, twenty-eight miles west of Goldendale, in the State of Washington, defendant negligently drove a motor vehicle against one Levi Frank, the late husband of plaintiff, who was then walking on the outer edge of such highway.

IV.

As a result Levi Frank was thrown down and killed, and by reason thereof plaintiff has been deprived of his love, affection, companionship, and support.

Wherefore, plaintiff demands judgment against defendant in the sum of Twenty-five Thousand Dollars ($25,000.00) and costs.

J. H. FELTON,

BERNICE BACHARACH,

Attorneys for Plaintiff.

State of Idaho,
County of Idaho—ss.

Lottie Frank, being first duly sworn, on oath, deposes and says:

That she is the plaintiff herein; that she has read the foregoing complaint, knows the contents thereof, and that the allegations therein made are true, as she verily believes.

LOTTIE FRANK.

Subscribed and sworn to before me this 6th day of December, 1945.

(Seal) HARRY J. HANLEY,
Notary Public.

Filed Dec. 12, 1945. [4]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Civil No. 244

MARTHA WOODS CORBETT,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

ANSWER

For answer to plaintiff's complaint defendant admits, denies and alleges as follows:

1.

For answer to paragraphs I, II and III of plain-

tiff's complaint this defendant denies each and every allegation therein contained.

For an Affirmative Defense defendant alleges:

1.

If plaintiff was injured or damaged in any respect as claimed in her complaint, such injury and damage was solely and proximately caused by plaintiff's own contributory negligence in failing to observe other users of the highway and failing to give other users of the highway the right of way to which they are entitled, in failing to walk upon the extreme left hand side of the highway as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of the defendant and to step to the left out of the path of his approaching car as required by said Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and being in an intoxicated condition and while in such condition walking or standing in the center of the highway, in failing to signal or warn defendant of the position of the plaintiff when plaintiff had an opportunity so to do.

Wherefore, defendant having fully answered the complaint of the plaintiff prays that the same be dismissed and that he have and recover his costs herein expended and incurred.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Defendant.

Filed Jan. 21, 1946. [6]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Civil No. 245.

LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

ANSWER

For answer to plaintiff's complaint defendant admits, denies and alleges as follows:

1.

For answer to paragraphs I, II, III and IV of plaintiff's complaint this defendant denies each and every allegation therein contained.

For an Affirmative Defense defendant alleges:

1.

If plaintiff was injured or damaged in any respect as claimed in her complaint, such injury and damage was solely and proximately caused by the deceased's own contributory negligence in failing to observe other users of the highway and failing to give other users of the highway the right of way to which they are entitled, in failing to walk upon the extreme left hand side of the highway

as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of the defendant and to step to the left out of the path [7] of the approaching car as required by said Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and being in an intoxicated condition and while in such condition walking or standing in the center of the highway, in failing to signal or warn defendant of the position of the deceased when the deceased had an opportunity so to do.

Wherefore, defendant having fully answered the complaint of the plaintiff prays that the same be dismissed and that he have and recover his costs herein expended and incurred.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendant.

Filed Jan. 21, 1946. [8]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Consolidated Civil Cases Nos. 244 and 245.

TITUS CORBETT and MARTHA CORBETT, husband and wife,

Plaintiffs,

vs.

JOHN C. WILKERSON,

Defendant,

and

LOTTIE FRANK, administratrix of the estate of LEVI FRANK, deceased,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

Before: Hon. Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington.

Yakima, Washington, May 8 and 9, 1946.

Be it remembered:

That the above entitled cases consolidated for trial came regularly on for trial and determination before the Hon. Sam M. Driver, United States District Judge for the Eastern District of Washington, on Wednesday, May 8, 1946, at Yakima, Washington; the plaintiffs appearing by Mr. J.

Henry Felton and Miss Bernice Bacharach; and the defendant appearing by counsel Nat U. Brown and F. S. Senn.

Whereupon, both sides having announced that they were ready for trial, Mr. Felton made an opening statement on behalf of the plaintiffs, and the following proceedings occurred, to-wit:

Mr. Brown: If the Court please, I had not anticipated that such a statement would be made, but in view of the fact that it has been made, I would desire to move for dismissal [1*] of the cases on the ground of what has been stated and——

Mr. Felton: I believe it is a proper opening statement.

Mr. Brown: I believe his statement, coupled with the complaint shows that the plaintiffs were guilty as a matter of law of contributory negligence and have no standing in court.

The Court: The motion will be denied.

Mr. Felton: I will call Mr. Hyland.

GORDON E. HYLAND

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Give your name to the court reporter.

A. Gordon E. Hyland. (H-y-l-a-n-d spelling)

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* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Gordon E. Hyland.)

Q. Where do you live, Mr. Hyland?

A. I live at Goldendale .

Q. And what is your official position for the State of Washington?

A. I am a Patrolman for the Washington State Patrol.

Q. How long have you been on the Washington State Patrol?

A. About two years. [2]

Q. Are you trained in examining highways and other places where accidents occur?

A. Right.

Q. And what does your training consist of?

A. We take a course every year under instructors in our own department and from outside departments, plus our experience on the highways in investigations.

Q. And as a patrolman and with the benefit of your training, did you make an examination of a highway point where the accident that we are talking about occurred? A. I did.

Q. And when did you make such an examination?

A. Immediately following the accident and the following day—I wouldn't say the following day. It was on the same day but it was after it became daylight.

Q. I am going to ask you some questions at this time which will be limited to physical facts; that is, so that the Court may know the physical facts surrounding this thing, and I want you to

(Testimony of Gordon E. Hyland.)

direct your testimony as to the condition of the road and so on, as of the morning of December 9, 1945. Each one of my questions will be directed to that thing. Now, when you went over there on the morning of December 9, 1945, what kind of highway did you find?

A. Weather conditions or road conditions?

Q. First, weather conditions, if you will please? [3]

A. The weather was clear and the road was dry. It is black top but is termed a non-standard type of pavement, rough finish on top.

Q. What is the width of the black top?

A. At that particular point, nineteen feet and six inches, the paved portion of the roadway.

Q. Is there a shoulder on the road?

A. Yes.

Q. Of what material?

A. Loose gravel and dirt.

Q. It was loose rock and dirt?

A. (Nodding head).

Q. Answer so that the reporter can get it.

A. Yes.

Q. What was the condition as to its being level or rolling?

A. There is a slight crown in the roadway. I am not in a position to say how much crown.

Mr. Felton: Can you make a drawing of the roadway and the position of the cars at the time you arrived there.

(Testimony of Gordon E. Hyland.)

Mr. Brown: Can't we use the blackboard and put it over there and make it large enough.

The Witness: Permissible to use my notes to refresh my memory?

Mr. Felton: May he use his notes? [4]

Mr. Brown: No objection.

The Witness: These notes were made at the time.

The Court: Yes.

Mr. Felton: I tell you, if you wish, we will put it on the black board and we can make copies of it.

Mr. Brown: I would rather have it on the black board.

Mr. Felton: All right, now, you draw the physical facts as you saw this on that day on the black board and stick to physical facts, will you.

The Witness: (Drawing on black board) Well, this may take some explaining. This wavy line is merely a chopping off of the end of the area.

The Court: Yes, I understand it.

Mr. Felton: Q. Go ahead and explain your road. Where is your black top?

A. We have nineteen feet, six inches of black top. This width here is the shoulder on this side of the road three feet and this side of the road it is two feet here.

Q. Now, which is north and which is south on that map; well that is away from the river?

A. Yes, right.

Q. Mark the word "river" on the other side.

(Testimony of Gordon E. Hyland.)

A. The Columbia River is down here.

Q. Write "river" so that we can get to it for the other witnesses. Now, where was Mr. Corbett's car? [5]

A. Well, we will take out some shoulder up here.

Q. Was Mr. Corbett's car parked on or off of the highway?

A. It was completely off of the highway. This particular spot up here is a turn-out or driveway on to a private road. He was parked in this turn-out into the driveway.

Q. And he was pointed in which direction?

A. He was pointed west.

Q. And where was Mr. Wilkerson's car?

A. At the time I arrived at the scene of the accident Mr. Wilkerson's car was down here in about this position.

Q. And were there any skidmarks on the road?

A. There were sixty-three feet of skidmarks. This at the scale is—this is a long ways out of perspective but——

Q. Where is the top of the hill?

A. It is just beyond the point where this car is parked. It is possible from this position to see the parked place, the parking spot where this car was sitting but if it was another two car lengths, you wouldn't.

Q. Now, where were the bodies—when you got there, there was one body, I believe.

A. As far as I know, there was only one. When

(Testimony of Gordon E. Hyland.)

I arrived there was but one body about in this position.

Q. And was there anything there to mark the spot, willows, I mean? [6]

A. Right here to the shoulder of the road was willows. This was all high grass down here and from here on down it was rock.

Q. How far could you see where the body was; from the point on the pavement where the body was, back west, what was the distance that lights were visible, if you know?

A. There is a distance here from the position of the body to the crest of the hill of 272 feet.

Q. And did you observe to see how far you could see another car from the crest of the hill or a point beyond?

A. This measurement which I made of 272 feet was taken from the "no-pass zone" striping.

Q. And, then, a car coming over the crest of the hill could see at least 272 feet to the point that you are talkin about?

A. He would be able to see whether there was another vehicle here.

Q. Or anything of the height of another vehicle?

A. Yes, or anything of the height of another vehicle. Those passing zones are based upon ordinary heights of cars. Those measurements were taken from the striping points of the highway department.

Q. Could you ascertain who was the driver of the death car? A. Mr. Wilkerson. [7]

(Testimony of Gordon E. Hyland.)

Q. From what did you ascertain that?

A. From him.

Q. He told you? A. Yes.

Mr. Felton: Will you draw it out on paper exactly what you have here and then we will have it that way on paper.

Mr. Brown: One more thing, is there a ditch on that shoulder.

The Witness: There is a ditch on both shoulders.

Mr. Felton: How deep were the ditches?

The Witness: I believe between two and two and a half feet.

Mr. Felton: All right, you may sit down.

The Court: I suggest, Mr. Felton, that you proceed with the examination and after the witness gets off of the witness stand copies may be made of the drawing which may be submitted to counsel and then submitted to the Court.

Mr. Felton: Yes, your Honor, I had that in mind.

Cross Examination

By Mr. Brown:

Q. Mr. Hyland, what is the height of the ordinary car that they use to make that measurement?

A. For the measurement, I don't know. [8]

Q. Have you any idea?

A. Well, it is over six feet.

Q. You don't know just what height they use in determining where the crossing line will be put in, the line for passing?

(Testimony of Gordon E. Hyland.)

A. No, they use two automobiles in determining that distance.

Q. Do they use patrol cars?

A. The highway department making these "no-pass zones" takes two vehicles and one of them in one direction and one of them in another, and when it is posible for the drivers in this position to see any portion of the other vehicle that is where you mark the start of the passing stripe.

Q. And the distance where you could see anyone lying on the ground would be very much less than that?

A. Yes, right.

Q. And people standing or walking would be less than that providing they would be under six feet?

A. It would be the difference between the person and the height of the automobile.

Q. And that distance would shorten very materially with anything less than the height of the automobile?

A. I presume it would shorten it, yes.

Q. How soon after the accident did you come out there, do you know? [9]

A. Oh, that, I can't remember.

Q. Were there any other cars parked around there?

A. There was one other vehicle — two other vehicles at the time I arrived. On the pavement in this position was the ambulance from The Dalles (indicating on drawing) which had loaded one of

(Testimony of Gordon E. Hyland.)

the people involved. Down at this point where he could crowd off at the shoulder was a truck tractor and truck trailer.

Q. Now, did you ascertain whether this truck tractor had been there prior to the accident?

A. He had not been.

Q. Was there another car up here prior to the accident?

A. None, as far as I know.

Q. Just the plaintiff's car? A. Yes.

Q. Was the plaintiff's car parallel to the road or slightly facing the road so that its lights would shine across?

A. That I couldn't say.

Q. Didn't you notice that? A. No.

Q. Did you notice whether the lights were on the car when you arrived? A. No.

Q. Isn't it a fact that this car was turned more lined [10] like this pencil lying at a forty-five degree angle pointed down the road with its lights on? A. I don't know.

Q. Who assisted you in making these measurements?

A. Well, my—I might state that——

Q. I beg your pardon?

A. I might state for the information of the Court that these measurements were not all made at the same time.

Q. I am interested in this now; first, did you say that there was sixty-three feet of skidmarks when those measurements were made?

(Testimony of Gordon E. Hyland.)

A. Those were made at the scene of the accident.

Q. When? That same night, or——

A. Yes, that same morning.

Q. And who assisted you in making those?

A. The Sheriff of Klikitat County.

Q. That was Sheriff Woodward? A. Yes.

Q. He is no longer Sheriff? A. Right.

Q. He had a deputy there? A. Yes.

Q. Did all of them assist you? A. No.

Q. Just the Sheriff? [11] A. Yes.

Q. And who called the measurements out; he did, and you put them down, or did you actually handle the tape yourself?

A. I handled the measuring end of the tape.

Q. There is a difference between what you call a skidmark and a tire mark, isn't there, Mr. Hyland?

A. Well, I would like to have an explanation of the question. Are you talking about——

Q. Well, there are tire marks where the car has been slowed down suddenly, even though the tires don't skid, isn't that true?

A. I wouldn't say that that was true on dry non-skid black top, no, not in our venacular of a skidmark.

Q. Isn't it a fact that when you put on your brakes and when you slow your wheels down that your wheels may still be turning, and the wheel makes a tire mark?

(Testimony of Gordon E. Hyland.)

A. Well, that is right. In our business we still consider that a skidmark.

Q. Well, in our business we don't. Well, are these marks, marks that indicate that the tires were still rolling and where the car was shoving the wheels faster than they were rolling?

A. That form of marks on the pavement could be definitely made whether the wheels were still locked or [12] rolling.

Q. The wheels were on a turn?

A. Right.

Q. So that isn't it a fact that if this car were suddenly turned and the car would skid that the marks wouldn't be directly behind one another, that the back end would swing over as it was skidding?

A. I don't quite get your question.

Q. Well, these marks show that the car turned on the——

A. (Interposing): To the left.

Q. To the left before the skidmarks started or before these marks started.

A. That I couldn't determine.

Q. Well, you show them on the turn all the way through?

A. Well, I was unable to determine whether the car started to turn before it skidded, no.

Q. Now, when it made that turn and while the tires were locked and skidding, wouldn't the rear end turn around if it were skidding?

A. Well, the skidmarks weren't directly right on top of one another.

(Testimony of Gordon E. Hyland.)

Q. Well, you mean the rear wheel would be on top of the front wheel, is that it? [13]

A. No.

Q. Did these skidmarks go right up to where the car was standing? A. Yes, right.

Q. Now, as to the position of this body that you saw there, you don't know whether that had been moved or not before you arrived?

A. No, other than the statement of the people there was all.

Q. We are not interested in the statement of the people.

A. We had no way of determining.

Q. The girl was already in the ambulance when you arrived? A. Yes.

Q. You didn't talk to her at all?

A. I attempted to talk to her at the hospital.

Q. How much later was that?

Mr. Felton: If the Court please, we object to that as improper cross examination.

The Court: He may answer.

A. Oh, from the time I arrived, I would say within one hour and a half.

Mr. Brown: Q. Was she conscious then when you talked to her? [14] A. Yes.

Q. Was there any indication of her having been drinking?

Mr. Felton: If the Court please, we believe that that is improper cross examination and we object to it as such.

(Testimony of Gordon E. Hyland.)

Mr. Brown: It may be improper cross examination, your Honor, but he is their witness and he is only going to be here for a little while and I can make him my witness.

Mr. Felton: The witness is going to be here all during the trial, and drinking will be taken care of later.

Mr. Brown: All right, if you wish. I will withdraw the question.

Mr. Felton: Mr. Hyland, you may draw that map at your leisure.

The Court: Q. Do you have a record of the time you came down there, the approximate time?

Mr. Brown: Oh, one other thing. Q. How far from the shoulder would you say that the outer skid mark was?

A. Between two and a half and three feet.

Q. About the width of the shoulder inside of the pavement, one the pavement?

A. A little less than that.

Mr. Brown: That is all.

The Court: I have asked the witness this question: If he could tell me the approximate hour when he went down [15] and examined the accident. I don't believe that that has been testified to.

Mr. Felton: I don't believe so either.

The Witness: I received my first call from the city police department at two-twenty o'clock a.m. I was at the scene of the accident at two-forty-five a.m.

(Witness excused.)

TITUS CORBETT

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Your name is Titus Corbett? A. Yes.

Q. How old are you, Mr. Corbett?

A. Thirty-four.

Q. Where do you live?

A. Kooskia, Idaho.

Q. You have a permanent home there, have you not? A. Yes.

Q. Are you married? A. Yes.

Q. To whom are you married?

A. Martha Corbett. [16]

Q. And you have been married to her at all times during the time we have been talking about here? A. Yes.

Mr. Brown: If the Court please, could I interrogate at this point. I didn't know he was the plaintiff's husband.

The Court: Yes.

Mr. Brown: Q. Are you the husband of the plaintiff? A. Yes, that is right.

Mr. Brown: I move that he be made a party plaintiff in this case.

Mr. Felton: I have no objection.

The Court: The motion will be granted.

Mr. Felton: Q. And did I ask you your age?

A. You started to, I think. It is thirty-four.

(Testimony of Titus Corbett.)

Q. You owned the automobile that your group was riding in on September 8th and 9th?

Q. Yes.

Q. And you were riding in the automobile, and who was with you in the automobile when you went to Celilo?

A. Well, Levi Frank was sitting next to me in the middle and Roy Whittaker on the outside, the three of us in the front seat. Directly in back of me was my wife and then Jane White was in the middle and Rachael Wilson was on the opposite side, the three of them in the back seat.

Q. That was at the time you came up to this turn-out [17] we are talking about?

A. Yes.

Q. You had previously been up at Goldendale, Washington? A. Yes.

Q. You heard the officer testify as to the highway? A. Yes, sir.

Q. And the physical facts on the highway?

A. Yes.

Q. When you came up to this point that he found your car what did you do?

A. What do you mean?

Q. When you came up to this point, what did you do when you first came up?

A. Well, ——

Q. Don't get up, just stay there.

A. Well, just before I moved to this parking place I was on the shoulder of the road and some soldier came up and told me I can't——

(Testimony of Titus Corbett.)

Q. Never mind what you were told. You came to the parking spot? A. Yes.

Q. How were you parked?

A. Parallel with the road off of the black top.

Q. In which direction?

A. Pointing to the west in this way. [18]

Q. Where did your passengers go to?

A. They went up the road, I don't know how far.

Q. They went up the road for a call of nature?

A. Yes.

Q. You and your wife had some discussion but did not get into an argument, is that right?

Mr. Brown: Objected to, your Honor.

The Court: Objection sustained. It is leading. Proceed.

Mr. Felton: Q. Who stayed with you in the car when the car was parked?

A. Mr. Whitaker.

Q. Where were your other four passengers, did you say?

A. Well, they went up the road, which side I don't know but they went up the road back of the car.

Q. That was east?

A. Yes, to the east.

Q. And when did you first see Mr. Wilkerson's car?

A. Well, I never at all until after the accident.

Q. I mean, when did you first see it?

(Testimony of Titus Corbett.)

A. Sometime later they told me whose car it was.

Q. When did you first see it that evening, when you first saw it approaching you?

A. Do you mean what time?

Q. No, I am talking about the position on the road; did [19] you see his car approaching you?

A. Yes.

Q. Tell the Court what you saw.

A. Well, I saw this car coming and it was coming pretty fast, and so I started dimming and blinking my lights and I pushed them on dimmer and this other car never did dim his lights.

Q. Then, what happened, what did you do when he came across your light; just tell us?

A. Well, he was going fast, you see, quite fast and not long after he passed me I heard somebody scream and call my name.

Q. And then what did you do?

A. I jumped out of the car and I run down the road and I found this one man Mr. Frank lying along the road on the shoulder of the road approximately three feet from the black top.

Q. And what was his position; how was he lying?

A. He was lying with his head to the north.

Q. And where was your wife?

A. My wife, she was lying in a ditch about ten feet from the—well, it would be about seven feet horizontal distance to the bottom of the ditch.

Q. Where was Jane White and Miss Wilson?

(Testimony of Titus Corbett.)

A. They were standing beside Mr. Frank. [20]

Q. Did you observe your wife's condition?

A. I did.

Q. And what was it?

A. Well, she was crying, suffering in pain and so I walked down into the ditch and I saw her foot was badly mangled, you see, full of crushed rock and dirt and weeds and grass and everything.

Q. Now, did you have a light with you?

A. Yes, I had a flashlight.

Q. You had a flashlight? A. Yes.

Q. Then, what did you do?

A. Well, she told me she was cold and she was crying and suffering.

Q. Now, keep the conversation out of it. You went ahead and got a blanket, did you?

A. Yes, I did, I went and got a blanket.

Q. Keep the conversations out except where Mr. Wilkerson was present. What did you do?

A. I got a blanket from my car and she stayed in the ditch where she was lying until the ambulance came.

Q. How long was it before the ambulance came?

A. I would say approximately that it was two hours, around that, after the accident.

Q. And where was Mr. Wilkerson at that time, if you [21] know?

A. Well now, when I saw him he was standing on the opposite side of the road talking to some man.

(Testimony of Titus Corbett.)

Q. You stayed with your wife then until that ambulance came? A. That is right.

Q. And this ambulance took your wife where?

A. To The Dalles Hospital.

Q. Did you know what the condition of Levi Frank was?

A. Well, he was lying there motionless.

Q. And it was later determined that he was what? A. That he was dead.

Q. Did he make any motion or sound from the time you went up there? A. No.

Q. Who came down to investigate the accident?

A. Well, this state patrolman came down there, this man here that just testified.

Q. Did anybody else come that you know of?

A. Not that I know of.

Q. Was there any inquest or anything of that nature? A. What?

Q. Any inquest held?

A. No inquest whatsoever.

Q. Did you go to The Dalles by yourself or were you [22] taken there?

A. I was taken.

Q Do you know what the instruction were when you were taken there? A. Yes.

Q. What were the instructions?

A. This state patrolman told the ambulance man to take me to the jail and hold me until they could question me.

Q. Were you taken to the jail? A. No.

Q. Where did you go?

(Testimony of Titus Corbett.)

A. To The Dalles Hospital.

Q. What happened there?

A. They took her and put her on a cot and the first thing they did was to give her injections to quiet her down because she was suffering.

Q. Did you look at the foot?

A. Yes, I did.

Q. Tell the Court about her foot.

A. It was badly mangled and the skin was torn off at the top at the toes and badly mangled, full of crushed rock and pretty bad looking.

Q. How long did your wife stay at the hospital?

A. Six weeks or thereabouts.

Q. Prior to that time she had been in the hospital, what [23] had she been doing?

A. Working at the shipyards.

Q. Where?

A. In the Albina Shipyards in Portland, Oregon.

Q. How old was your wife?

A. Twenty-six.

Q. Was she in good health before this thing?

A. Yes.

Q. Had she had any trouble with her foot?

A. No.

Q. Any trouble with her back? A. No.

Q. Was there an injury to her back, so far as you know? A. Severe injury.

Q. What?

A. There must be some kind of fracture because she couldn't move. I went there in the morning at

(Testimony of Titus Corbett.)

seven o'clock. I couldn't even sit on the bed because that disturbance would irritate her. That was how severe she was hurt.

Q. You stayed around The Dalles until she got well, did you?

A. Yes, six weeks.

Q. Where did you take her?

A. I took her to my home, Kooskia, Idaho.

Q. Your home where? [24]

A. Kooskia, Idaho.

Q. Now, let us go into this defense work a little bit more that she was doing. How long was she——

Mr. Brown: Objected to, if the Court please, there is no pleading of any time loss, or mention of the time loss. It is $725 medical care and $25,000.00 general damages.

Mr. Felton: I believe under the new rules it isn't necessary.

The Court: There is an allegation here that she was prevented from transacting her business. I will let it in and consider whether or not it should be allowed.

Mr. Felton: Q. The question was to describe her defense work a little better and more particularly than you have done. Where did she first work at defense work?

A. She first worked at San Diego, California.

Q. What did she do?

A. She was a riveter there.

Q. Do you know what wages she received?

(Testimony of Titus Corbett.)

A. Fifty to seventy-five dollars per week.

Mr. Brown: My objection goes to all of this.

The Court: Yes, the record will show that it does.

Mr. Felton: Q. And where did she later work?

A. She worked in Portland.

Q. How long did she work in Portland?

A. Oh, between eighteen months and two years.

Q. What was she doing there?

A. She was a welder.

Q. What were her wages there?

A. Between fifty and seventy-five dollars per week.

Q. Now, breaking it down, what was her hourly wage?

A. $1.25 per hour.

Q. Now, that builds up in overtime?

A. Yes, it does considerably.

Q. And what was her hourly rate in California?

A. Ninety-five cents an hour.

Q. Now, coming back to her time in the hospital, just describe to the Court how she looked and felt during the various times that you went in her room; give the Court some idea of how she was while you were there.

A. Well, she suffered very much from this injury and in fact lots of times when I went in she seemed to be crying and she would be crying. She suffered and they couldn't do very much about it. They could only give her so much medicine. And

(Testimony of Titus Corbett.)

she lost so much weight while she was in the hospital.

Q. And how long did this plan last?

A. It subsided in seven or eight days until they gave her the second operation.

Q. Well, the operation will be put in by the doctor. A. Yes. [26]

Q. Is she suffering pain still?

A. Yes.

Q. And what is her condition?

A. Well, when she has to stand on her foot and has to be on her feet she has to favor that foot and keep it over on an angle, and her back bothers her considerably. In fact, she can't lie on her back.

Q. How about the rest of the time?

A. She can't lie or stand very much at a time.

Q. Does she wear any mechanical aid?

A. She has a drop-foot brace.

Q. And what did she wear before that?

A. None, not any at all.

Q. Did she wear crutches for a while?

A. Yes, she did.

Q. For how long?

A. Well, about five or six months she had to use crutches.

Q. I am reminded that I left out the time of the accident; when was it again? Oh, do you remember about what time you stopped up there on the hill?

(Testimony of Titus Corbett.)

A. I would say it was approximately one o'clock or near one o'clock.

Q. And about what time do you think the accident occurred? [27]

A. Well, it was—I would say about one o'clock, it either could have been a few minutes before or a few minutes afterward.

Q. It wasn't very long after you stopped there?

A. No, it couldn't have been very long.

Q. Did you notice any other cars there at the particular time that the accident occurred, either passing or coming or going or anything else?

A. There was no cars except this car that was approaching me.

Q. And your own car?

A. And my own car.

Q. You are sure of that?

A. Positive.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. You told us just a few minutes ago that some soldiers told you to move up and park some other place, and weren't they there at the time of the accident?

A. No, they were not.

Q. Isn't it a fact that they just moved up a little ways and parked?

A. No, there was not other car there. [28]

Q. Answer my question: Didn't you see these same soldiers right after the accident?

(Testimony of Titus Corbett.)

A. No.

Q. The same soldiers? A. No.

Q. Didn't they talk to you? A. Positive.

Q. You are also sure that the highway patrolman told the ambulance driver to go with you to the jail?

A. He told the ambulance driver to have me in jail so that they could be there and question me.

Q. Is that this gentleman that just testified that told the ambulance driver that?

A. Yes.

Q. Are you sure of that?

A. Yes, he told the ambulance driver that before we left.

Q. Where were you parked before these two soldiers told you you better move your car?

A. I would say about thirty feet back.

Q. Back in here some place (indicating on map)?

A. Yes, back in here someplace (stepping down to map).

Q. That would be thirty feet east of where you ultimately parked your car?

A. Yes, that is right. [29]

Q. How did these soldiers happen to talk to you?

A. Well, I was parked on the shoulder of the road and they told me I had better move to a better parking place.

Q. Where were your wife and the rest of the people when you were up the road?

(Testimony of Titus Corbett.)

A. They went up the road in back of the car.

Q. As a matter of fact, they were out in the middle of the road, weren't they?

A. I didn't know where they were until I seen them.

Q. Well, I know, you moved your car up a considerable distance? A. Yes.

Q. Did you say anything to your wife that you were moving your car? A. No.

Q. Did you see her at all while you were moving the car? A. No.

Q. So, you don't know where she was?

A. No, she may have been up the road.

Q. Who did she go up the road with?

A. Jane White and Rachael Wilson.

Q. Jean? A. No, Jane.

Q. And who was the other one? [30]

A. Rachael Wilson.

Q. Did Mr. Frank go up with them?

A. No, not at that time.

Q. Did he stay in the car with you?

A. He left shortly after.

Q. When they first got out he stayed in the car?

A. Yes, he left shortly after.

Q. Was he in the car when you moved the car?

A. Yes.

Q. Did he get out? A. No.

Q. Isn't it a fact that he got out to pick up your wife off of the road? A. No.

Q. Didn't the soldiers tell you to get her off of the road? A. No.

(Testimony of Titus Corbett.)

Q. You stayed in the car until after the accident? A. Yes, that is right.

Q. You were about the brow of the hill when this car passed? A. Yes.

Q. You didn't hear your wife scream?

A. I didn't hear my wife scream.

Q. You heard somebody scream? [31]

A. Yes.

Q. You don't know what he did after he passed you or what the other car did that was approaching you, whether he slowed down?

A. If he had to turn—he did not slow down.

Q. Well, you don't know whether he did or not?

A. I don't know whether—I would say that he did not slow down.

Q. How do you know? You did not see him. You testified that you did not see him and did not know about the accident until you heard a scream. How do you know that he was approaching fast?

Mr. Felton: We object to this line of cross examination.

The Court: You may proceed with the witness. Read the question, Mr. Reporter.

(Last question read.)

A. Well, in that distance at the speed that he was going, he couldn't slow down.

Mr. Brown: Q. Now, how far was it from your car when you first saw him?

A. Oh, I would say three hundred yards.

Q. How far beyond your car?

(Testimony of Titus Corbett.)

A. Do you mean beyond? Do you mean how far was he when I first saw him? [32]

Q. When you first saw him approaching.

A. Well, I saw his lights a considerable distance down the road when I started blinking my lights on him, about three hundred yards.

Q. Your car was clear off of the road?

A. That is right.

Q. Clear off of the road? A. Yes.

Q. Was it beyond the shoulder on that turn-off?

A. Yes.

Q. Clear beyond the shoulder? A. Yes.

Q. And there were weeds and high grass in the ditch beyond the turn-off along that side of the road? A. No.

Q. There is no ditch?

A. Yes, there is a ditch.

Q. And there was no willows close in there?

A. No.

Q. You are sure of that? A. Yes.

Q. And so you think your lights would be visible through there coming down the road?

A. Yes, they would be absolutely because I could see his lights for some distance. [33]

Q. Now, getting back just a minute to this soldier there that talked to you, after he talked to you, what did he do?

A. He drove down the road.

Q. And you saw his car going down the road and disappear out of sight? A. Yes.

Q. Where is your home?

(Testimony of Titus Corbett.)

A. Kooskia, Idaho.

Q. Are you a Tribal Indian? A. Yes.

Q. And what Tribe? A. Nez Perce.

Q. Is your wife a Tribal Indian? A. Yes.

Q. Same Tribe? A. Yes.

Q. Where had you been? A. At Celilo.

Q. What were you doing at Celilo?

A. We were looking for the mother of the boy to take him, to see the mother of the boy.

Q. And you had been going back at what time?

A. Ten o'clock.

Q. Ten o'clock in the morning? [34]

A. No, ten o'clock previous to the accident.

Q. Ten o'clock in the evening, that evening?

A. Yes.

Q. Was there a celebration there?

A. No.

Q. What was the nature of it?

A. Just a carnival.

Q. Was it a carnival or rodeo?

A. Just a carnival right outside of town.

Q. How many people were with you?

A. Five other people besides me.

Q. There was your wife and Miss Wilson, is that right? A. Yes.

Q. And the Franks?

A. And Miss White and Whitaker.

Q. Now, how did you stay so long in Goldendale; what were you doing so long in Goldendale?

A. We were——

(Testimony of Titus Corbett.)

Mr. Felton: If the Court please we object to that as immaterial.

Mr. Brown: Q. What were you doing in Goldendale; what were they doing?

Mr. Felton: If the Court please, we object to this.

The Court: Objection overruled.

A. We were taking in the carnival. [35]

Mr. Brown: Q. And you left Goldendale about what time?

A. Ten o'clock. Oh, you mean Goldendale?

Q. Yes.

A. The carnival closed at midnight and we left then.

Q. Where were you headed for?

A. To the ferry.

Q. And you did not go to any other place in Goldendale? A. No.

Q. And then the girls got out of the car?

A. Yes.

Q. None of the men got out? A. No.

Q. As a matter of fact, hadn't your wife and you had an argument? A. No.

Q. And hadn't she refused to get back in the car? A. No.

Q. And hadn't you all got out for a while?

A. No.

Q. Had you seen her lying on the road for a while? A. Did I see her lying on the road?

Q. Yes. A. No, I did not.

Q. Did you walk along the road? [36]

(Testimony of Titus Corbett.)

A. Did I walk along the road?

Q. Yes. A. After the accident?

Q. Yes.

A. No. I did not at that time, I made no trip along the road.

Q. When did you?

A. Two weeks after the accident.

Q. Do you recall that you picked up your wife's shoe on the highway?

A. Did I pick up the shoe of my wife on the highway?

Q. Yes.

A. No, I did not pick it up. It was lying in the ditch along side of her.

Q. Oh, you didn't see somebody pick it up and put in over there? A. No.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.) [37]

MARTHA CORBETT,

a plaintiff herein, called and sworn as a witness on her own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. Your name is Martha Woods Corbett, is it?

A. Yes.

Q. Now, you will have to speak up a little bit

(Testimony of Martha Corbett.)

because we all have got to hear you, and no matter what your inclination is, you have to speak up.

A. Yes.

Q. Where do you live, Mrs. Corbett?

A. Kooskia, Idaho.

Q. How long have you lived there?

A. Ever since I have been married.

Q. And how long has that been?

A. Five years.

Q. How old are you, Martha?

A. Twenty-six.

Q. And prior to September 9th, 1945, you had been working for a couple of years, had you?

A. Well, I had been working almost all the time I was married.

Q. And where were you working after you were married?

A. Well, before the accident I had been working in [38] Portland.

Q. And where at in Portland?

A. Albina Engine and Machine Works.

Q. And what was your position there?

A. Welder.

Q. And that was in the shipyards, was it?

A. Yes.

Q. How long were you working there?

A. Oh, it must have been about eighteen months.

Q. And what did you make while you were working there?

A. Well, we welded on the ships.

(Testimony of Martha Corbett.)

Q. Well, I mean, how much money did you make, is what I am talking about?

A. Well, an average of fifty to seventy-five a week.

Mr. Brown: If the Court please, I renew my objection to this line of testimony so I do not have to keep interrupting.

The Court: The record may show that your objection goes to all this line of testimony.

Mr. Felton: Q. How much did you get an hour there? A. $1.20.

Q. And your fifty or seventy-five dollars a week we are talking about is how much an hour?

A. Well, that would be just an average.

Q. You got $1.20 an hour? [39]

A. Yes.

Q. How many hours did you usually work in a day?

A. Well, I worked eight hours a day.

Q. And how many hours a week?

A. Well, for about five months or so I worked seven days a week.

Q. There was some overtime connected with this was there? A. Quite a bit.

Q. And how much did you get for overtime?

A. I got time and a half and double time on Sundays.

Q. And before you worked at Portland where did you work? A. Down at San Diego.

Q. And what were your wages there?

A. Ninety-five cents an hour.

(Testimony of Martha Corbett.)

Q. And how many hours a day did you work there? A. Eight hours.

Q. And what were you doing there in San Diego? A. I was a riveter in the aircraft.

Q. And how many hours a week did you work down there?

A. Well, I just worked six days a week down there.

Q. And how many hours a day, did you say; eight? A. Eight hours a day.

Q. And it was time and half for overtime down there, was it? [40] A. Yes, on Saturdays.

Q. Now, at the time on September 8th, 1945, that is, calling your attention back to the time you went to Goldendale, do you remember getting in the car and coming from Goldendale with your husband and these other people we have been talking about? A. When we left Goldendale?

Q. Yes. A. Yes.

Q. What was your position in the car from Goldendale?

A. Well, three men were in the front and three of us were in the back.

Q. The three men in the front and the three women in the back, is that true? A. Yes.

Q. And did you stop on the highway someplace? A. No.

Q. I mean just before the accident, did you stop? A. No.

Q. Well, now, your car stopped down there before you got out, didn't it?

(Testimony of Martha Corbett.)

A. Oh, it stopped, yes, do you mean when we——

Q. You misunderstand me. You stopped the car on the highway and you and the other women got out of the car, did you? [41] A. Yes.

Q. What was the purpose of that stop?

A. Well, we had to go to the toilet.

Q. In other words, you had to attend to the calls of nature? A. Yes.

Q. What other people got out of the car with you? A. Jane and Rachael.

Q. That is Jane White and Rachael Wilson?

A. Yes.

Q. And where did you go after you got out of the car? A. We walked up the highway.

Q. How far, do you know?

A. Oh, it wasn't very far, I couldn't say.

Q. Two or three hundred feet?

A. Oh, about a couple of hundred feet, I guess, down there.

Q. Which side of the highway did you go up?

A. When we were going back to the car?

Q. No, when you were going away from the car, when you first got out?

A. Well, we walked on the same side as the car, right behind it.

Q. And after you attended to the calls of nature which side of the road were you on? [42]

A. We cut over.

Q. Did one of the men go with you after you attended to the calls of nature?

A. He was already over there.

(Testimony of Martha Corbett.)

Q. Who was it? A. Levi Frank.

Q. Then, what did you do?

A. Well, we started walking back to the car.

Q. Tell the Court how you started walking.

A. Well, Rachael was in front——

Q. Speak up. Go ahead.

A. Rachael was in the lead and Jane was right behind her and I was third and Levi was walking directly behind me.

Q. And where were you walking; was it on the black top or the shoulder?

A. Walking on the gravel.

Q. Did you ever walk on the black top excepting crossing over?

A. Just when we crossed over.

Q. When did you first see this car that hit you?

A. Well, we just seen the car lights coming.

Q. Now, from the time you first saw it until you landed in the ditch, will you tell the Court as well as you can what happened?

A. Well, I just remember seeing the car lights coming [43] and I heard somebody say a car was coming and I turned around to see where Levi was and he was behind me, and when I came to I was lying in the ditch

Q. At that time you are sure that you were on the shoulders of the road? A. Oh, yes.

Q. And when you came to where were you?

A. I was what?

Q. When you came to where were you?

A. I was lying in the ditch.

(Testimony of Martha Corbett.)

Q. And where was Levi?

A. I couldn't see him.

Q. And who came there?

A. Nobody was there until one of the girls hollered for my husband and he came down.

Q. Do you remember what happened after you were hit?

A. Well, I remember turning around to see where Levi was and then I was in the ditch.

Q. Do you remember how you were hit or what happened to your foot of any kind?

A. Well, I guess it was run over.

Q. Well, you guess it was, but you don't have any remembrance of what happened?

A. Well, I guess I was knocked out for a while.

Q. And then your husband came up and could you look at [44] your foot?

A. No, my back was hurt.

Q. You did not look at your foot?

A. No, they wouldn't allow me to see it.

Q. How long did you stay in that ditch?

A. It must have been two hours, it must have been quite a while.

Q. And who came down with you and stayed with you? A. My husband.

Q. And did Mr. Wilkerson ever come down in the ditch where you were?

A. Nobody else came down.

Q. And then you were taken in the ambulance to The Dalles? A. Yes.

Q. And you went to the hospital, did you?

(Testimony of Martha Corbett.)

A. Yes.

Q. How long did you stay at the hospital?

A. Six weeks.

Q. If you experienced any pain, tell the Court about it.

A. Well, it was pretty terrible. I don't believe I could describe it.

Q. Well, as well as you can. How long did it last?

A. Well, from the time I was hurt. I guess most of the time while I was in the hospital. [45]

Q. Now, before you had this accident, what was your physical condition?

A. I was in perfect health.

Q. Had you ever had any sickness or anything to interfere with your physical condition?

A. No.

Q. Had you ever had any injuries to your foot and back? A. No.

Q. When you first got out of the hospital did you use crutches? A. Yes.

Q. And for how long a time?

A. It must have been about five months, not quite.

Q. Did they operate upon your foot?

A. Yes.

Q. How many times? A. Twice.

Q. At the present time do you wear any mechanical aid? A. Yes, I have a foot brace.

Q. What is it?

A. (Witness exhibits foot.)

(Testimony of Martha Corbett.)

Q. Swing around so that the Judge can see it. Will you take off your mechanical aid and your shoe so that the Judge can see your foot.

The Court: Do you wish to come up and see the lady's [46] foot, Mr. Brown?

Mr. Felton: Q. And where does the cut run?

A. Well, it must be right around here.

Q. And is this new skin here? A. Yes.

Q. And how many operations did you have on that foot? A. Two.

Q. And at the present time why do you wear this mechanical aid?

A. Well, to keep my foot from going forward because the tendons are injured and they won't hold.

Q. Is that the reason for this piece of metal under the heel of the brace? A. Yes.

Q. Are you able to walk without that mechanical brace?

A. No, I have been wearing that mechanical brace all the time.

Q. And what do you do when you sleep?

A. I always put a pillow at the foot of the bed so that my foot is held up.

Q. And the toes are held up towards the knee, is that it? A. Yes.

Q. And if you don't do that what happens?

A. Well, it has a tendency to twitch too much.

Mr. Felton: Now, put on your shoe.

The Court: I have finished my inspection.

(Testimony of Martha Corbett.)

Mr. Felton: Q. Now, do you know how much skin graft was drawn on that foot?

A. I remember the doctor saying——

Q. No, not what he said. If you don't know, don't testify to it. Now, you have still some difficulty with your back; I believe you testified to that?

A. Oh, yes, I have.

Q. And how is that?

A. Well, it makes me awfully tired and it aches a good deal and when I am lying down I can't turn directly over and I have to brace myself with hands and elbows.

Q. And what happens at nights?

A. It aches.

Q. Do you use anything else?

A. A hot water bottle.

Q. I mean, do you use anything to brace your back?

A. No, I use a hot water bottle.

Q. Does this restrict your activities?

A. Yes.

Q. Tell the Court what it is.

A. I haven't been able to do any housework.

Q. Are you able to work at welding or mechanical work at all? [48] A. No.

Q. Can you do any of that work at all?

A. No. Very little.

Mr. Felton: You may inquire. Wait a minute, I forgot just one question. Q. Did you accumulate any doctor bills by reason of the accident?

A. Yes.

(Testimony of Martha Corbett.)

Q. Where?

A. The The Dalles General Hospital.

Q. And how much was the doctor and hospital bill?

Mr. Brown: Haye you got a bill. That would be the best evidence.

A. We haven't got our receipts with us.

Mr. Felton: Q. Do you know how much the bill was? A. Not exactly.

Q. It was something over $700.00?

Mr. Brown: Object to that.

Mr. Feltonff I will withdraw that question. Go ahead.

Cross Examination

By Mr. Brown:

Q. How long between the time that you got out of the car and the time of the accident?

A. How long was it?

Q. Yes, between the time that you got out of the car and the time that the automobile hit you?

A. It couldn't have been very long because, oh, it was approximately eight or ten minutes or so.

Q. Does this look at all familiar to you? (Indicating on map). When you first got out of the car your husband was parked on the shoulder on the side of the road?

A. Yes, when I first got out.

Q. Did you ever see your car move?

A. We never paid any attention to it, we were walking up the road.

(Testimony of Martha Corbett.)

Q. You didn't see your husband move the car, did you? A. No.

Q. At any time, did you? A. No.

Q. And didn't this other man get out of the car shortly after you did and follow back after you up the road?

A. I didn't see him get out but he must have got off because when we walked across the highway he was already over there.

Q. Wasn't he helping you to walk along when you were hit? A. What is that?

Q. Wasn't he helping you to walk along when you were hit by this car?

A. No, I was walking by myself.

Q. Before this car came from the west there was another car that came from the other direction wasn't there; and they [50] talked to you?

A. No.

Q. Do you remember seeing two soldiers and they talked to you? A. No.

Q. At any time that evening?

A. There wasn't anybody.

Q. Do you remember lying down in the middle of the highway?

A. I didn't lie down in the middle of the highway.

Q. At any time? A. No.

Q. And it is your testimony that you were on the gravel portion at all times?

A. When we were walking up to the car, yes.

Q. When you were walking up to the car?

(Testimony of Martha Corbett.)

A. Yes.

Q. You never did step off of the gravel portion?

A. No.

Q. You weren't on the black top at all, is that right?

A. When we walked across the highway we were, yes.

Q. I think you said there were two girls walking ahead of you, were there? A. Yes.

Q. And they were directly ahead of you, were they? [51] A. Yes.

Q. And this automobile didn't touch them, did it? A. It hit both of their hands.

Q. It hit their hands? A. Yes.

Q. But it hit you solidly and hit Mr. Frank solidly? A. Yes.

Q. And they were walking ahead of you?

A. Yes.

Q. You admit that? A. Yes.

Q. And Mr. Frank didn't have his arm around you holding you? A. No.

Q. You weren't walking in the middle of the road when these two soldiers came up and stopped?

A. No.

Q. You don't recall them at all?

A. No, there was no soldiers talking to us.

Q. No soldiers were there talking to you before the accident? A. No.

Q. Now, I don't want to embarrass you but we want the truth about it. It is your testimony that there was no soldiers there talking to you? [52]

(Testimony of Martha Corbett.)

A. They didn't talk to us.

Q. Oh, you knew that they were there?

A. I didn't see them.

Q. You didn't see two soldiers? A. No.

Q. And do you remember them saying to get out of the road or you would be killed; don't you remember that? A. No.

Q. They came up to you and told you to get out of the road or you would be killed? A. No.

Q. As a matter of fact, you don't remember much about that evening, do you?

A. Sure I do.

Q. You don't remember much about leaving Goldendale? A. Sure I did.

Q. About leaving Goldendale?

A. Yes, sure, we left after the carnival was over.

Q. And your husband's car stopped and you got out of the car on the road, and how far back of the car did you go? A. It wasn't very far.

Q. Didn't you testify that it was one hundred yards or so that you walked back?

A. Well, that isn't very far.

Q. Well, you walked back one hundred yards, you say? [53] A. Yes.

Q. You walked back on the side of the road?

A. Yes.

Q. It was dark, wasn't it? A. Yes.

Q. Very dark? A. Yes.

Q. Why did you walk so far back on the high-

(Testimony of Martha Corbett.)

way, one hundred yards; isn't that a city block in your mind? Why did you go so far back?

A. Because I had to.

Q. Now, as a matter of fact, you and your husband had been quarreling in the car, hadn't you?

A. I wouldn't call it a quarrel.

Q. Well, tell the Court what it was you were arguing with each other about?

A. It wasn't an argument. It was a discussion. We weren't arguing.

Q. What about?

A. We were discussing the matter of whether we should go clear to Pendleton or stay at Celilo until my sister got back.

Q. And you got mad and got out of the car, is that right? A. No. [54]

Q. And started walking to Goldendale and these girls followed and Mr. Frank followed you?

A. I got out for another purpose.

Q. And you didn't talk to the soldiers at all? Now, do you remember seeing these two soldiers in uniform there that evening at any time?

A. No.

Q. Would you say they weren't there and didn't talk to you at all?

A. They didn't talk to me.

Q. And don't you remember that you were afraid that they were policemen and told them to go on about their business; don't you remember telling the two soldiers that, the two men in uniform?

A. I didn't see any soldiers.

(Testimony of Martha Corbett.)

Mr. Brown: You didn't see them? That is all.

Redirect Examination

By Mr. Felton:

Q. And, then, you got out of the car to attend the call of nature, didn't you? A. Yes.

Q. And that was the reason you went up the road so far because it was an open road?

A. Yes. [55]

Mr. Brown: Object to counsel leading her so much.

The Court: It is leading.

Mr. Felton: That is all.

(Witness excused.)

LOTTIE FRANK

a plaintiff herein, called and sworn as a witness on her own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. And your name is Lottie Frank, is it not?

A. That is right.

Q. And your late husband's name was Levi Frank? A. Yes.

Q. And where do you live, Mrs. Frank?

A. Kooskia, Idaho.

(Testimony of Lottie Frank.)

Q. And do you and your husband have any children?

A. No. None of our own. We had two of my brothers. We raised one from a baby.

Q. And are you the administratrix of your husband's estate? A. That is right.

Q. And where were you appointed?

A. At Grangeville.

Q. And you still are Administratrix of your husband's [56] estate? A. Yes.

Mr. Brown: You didn't put any petition or order or copy of them in.

Mr. Felton: Yes, I have.

Mr. Brown: I would like to see it. Pardon me, just a minute, I didn't want to object but I want to know about this.

Mr. Felton: That is the testimony I want out of this witness at this time. I want to call her for purely damage features later on so that my case may be in rotation. I will put those in if you wish.

Mr. Brown: No, she testified.

Mr. Felton: You may inquire.

Mr. Brown: No questions.

Mr. Felton: You see, I want to recall her, your Honor.

The Court: You may recall her later.

Mr. Brown: No questions.

(Witness excused)

JANE WHITE

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Your name is Jane White? [57]

A. Yes.

Q. And where do you live?

A. Kooskia, Idaho.

Q. How old are you? A. Thirty-eight.

Q. And were you with these people on September 8th and 9th, the time we have been hearing about in the testimony here?

A. Yes, I was.

Q. And were you in the car when it left Goldendale and pointed for The Dalles?

A. Yes, I was.

Q. Do you remember approaching and stopping at this place on the highway that we have been talking about? A. Yes.

Q. Tell the Court what happened at the time the car stopped on the highway and you girls got out; what happened there?

A. We got out and went back behind the car. I don't know just exactly how far we went. After we were coming back to our car we crossed the highway to the river side and walked back up to our car.

Q. And at the time you crossed the highway and started back to your car, how far were you behind your car? A. We were—— [58]

(Testimony of Jane White.)

Q. I mean, how many feet, if you can judge it?

A. I would say one hundred.

Q. You heard the patrolman testify. Was he approximately correct, according to your remembrance?

A. Well, I wouldn't know just how far it is, one hundred or two hundred feet.

Q. Then, when you were walking on the highway where were you?

A. We were off on the side, off of the pavement, we were on the gravel.

Q. And you were not on the black top?

A. No, we were not.

Q. And when did you first see Mr. Wilkerson's car approaching?

A. Well, we were walking, we were about halfway back to the car, I imagine.

Q. And how were you walking; who was in front and so on?

A. Rachael Wilson was in front and I was next and Martha next and Levi. We were walking single file.

Q. And at the time you saw Mr. Wilkerson's car approaching, just tell the Court what happened there at that time?

A. Well, we were just walking. Of course, we didn't think anything about it. We were real careful of not getting run over or anything like that and it was coming so fast that before I knowed it, it happened. [59]

Q. And what happened?

(Testimony of Jane White.)

A. Well, Rachael was walking ahead and I turned around, I turned back and those two people were gone.

Q. And the car hit you?

A. Yes, it cut my thumb.

Q. Which thumb?

A. The right one, the right side.

Q. And were you looking towards the car coming towards you? A. Right.

Q. And it hit your thumb and passed?

A. Yes.

Q. Now, you were walking on the highway, and how did you walk?

Mr. Brown: Objected to.

The Court: Objection sustained, as leading.

Mr. Felton: (Q.) And as soon as the car passed, you say, you turned and looked for the other two? A. Yes.

Q. Where did you see them?

A. Well, they were gone.

Q. You saw them later? A. Yes.

Q. Where?

A. They were both in the ditch. [60]

Q. Tell the Court how they were lying in the ditch.

A. Well, there was Mrs. Corbett lying kind of on the ditch and her head was down and Levi was further up closer to the road with his head towards the road.

Q. Did Levi ever make any movement at all?

A. Never.

(Testimony of Jane White.)

Q. Did one of your members make a noise, yell for somebody or scream? A. Yes.

Q. Which one? A. I believe I did.

Q. What? A. I believe I did.

Q. And how long did you stay in that place?

A. After the accident?

Q. Yes.

A. I must have been there about two or three hours.

Q. And did you see Mr. and Mrs. Wilkerson there around there at any time?

A. No, I didn't. I guess I was so upset, I didn't notice them.

Q. Where did you stay?

A. I stayed with Levi.

Q. Did you know he was dead at that time?

A. What? [61]

Q. I say, did you know he was dead?

A. (witness cries)

Q. I know that this is hard to do but keep on going, will we. When did you first find out that Levi was dead?

A. Well, just about right away.

Q. And you stayed with him there until they took him away, did you?

A. Yes, I did.

Q. And did he ever make any sound or outcry or anything of that nature?

A. No, he didn't.

Q. Who was with Martha?

A. Titus was, her husband.

(Testimony of Jane White.)

Q. How did you get back to Celilo?

A. I don't know, somebody took us.

Q. You heard on cross examination about some soldiers there. Did you see some soldiers there?

A. No, I didn't see no soldiers there.

Q. You three girls were together all the time, were you? A. Yes.

Q. You heard some cross examination about Martha lying down in the middle of the road, didn't you? A. Yes, I did.

Q. Did you see any such thing? [62]

A. No, I didn't.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. You say that Miss Wilson was ahead of you walking back to the car, is that right?

A. That is right.

Q. And you were next, is that right?

A. Yes, unhuh.

Q. And then, Mrs. Corbett and then Levi.

A. Yes.

Q. Now, when did Levi join you back of the car there?

A. Just a few minutes after we got out.

Q. Well, you had been out of the car for sometime, had you?

A. It didn't seem very long.

Q. Was the car parked down here or up here

(Testimony of Jane White.)

(pointing on map)? That is, when you got out of it?

A. It was parked up there.

Q. Above the car here?

A. When we got out of the car?

Q. Yes. Isn't it a fact that he just pulled along side of the road and you got out of the car?

A. Well, he pulled off of the road. I don't know whether he ever moved or not. [63]

Q. Well, you recall seeing your car move after the accident, don't you? A. No, I don't.

Q. You don't remember that?

A. No, I don't.

Q. And you were clear on the shoulder, you say, when you were walking along?

A. That is right.

Q. And that shoulder, the witness said, is three feet; is that about right? A. Yes, three feet.

Q. And how wide would you say this ditch is?

A. About two or three feet.

Q. About the same width of this shoulder.

A. Yes, about.

Q. And you were clear off on the shoulder?

A. Clear off of the hard road.

Q. And this car hit you on the thumb?

A. Yes, that is right.

Q. And was this thumb treated by any doctor?

A. Well, they taped it at the hospital at The Dalles.

Q. And you were going along there and do you know what part of the car hit you?

(Testimony of Jane White.)

A. I don't know what part of the car hit me, it was coming so fast. [64]

Q. And Miss Wilson was directly in front of you? A. Yes.

Q. And was she also on this three foot portion of the road? A. Yes.

Q. And the other two were in back of you?

A. Yes.

Q. And all three on the shoulder?

A. Yes.

Q. And after the accident do you recall anybody talking to you about it?

A. After the accident?

Q. Yes. Almost immediately after the accident?

A. Talking to me about the accident?

Q. Yes. Do you remember Mr. Corbett—Titus Corbett, isn't that his name, Titus Corbett?

A. Yes.

Q. Do you remember him coming down to where his wife was lying?

A. Yes, I remember him coming down.

Q. Who was with him?

A. Nobody was with him.

Q. Absolutely no one?

A. Well, I just heard him. There was a voice and I wasn't paying any attention. [65]

Q. It was so dark you couldn't see, is that right?

A. Well,——

Q. Isn't that right?

A. Well, it was pretty dark.

(Testimony of Jane White.)

Q. And there were no car lights or lights there in that place? A. No.

Q. Who was left in the car after Levi got out?

A. Just Titus Corbett and Roy Whitaker.

Q. And who? A. Roy Whitaker.

Q. Whitaker? A. That is right.

Q. Is he in court? A. That is right.

Q. Is here here now? A. Yes.

Q. Which one? They were left in the car?

A. Yes.

Q. Now, had there been a fight or argument in the car before you stopped?

A. No, there wasn't.

Q. No disagreement of any kind?

A. No.

Q. They were all perfectly friendly? [66]

A. That is right.

Q. And Titus and his wife hadn't gotten into an argument. A. No, they didn't.

Mr. Brown: That is all.

Redirect Examination

By Mr. Felton:

Q. Did anyone ever ask or make inquiry as to who was injured, or whether they could help or not?

A. No.

A. Any of the white people in the car?

A. No. I don't know of it. I was very upset. I don't remember of anything.

Q. You have known Levi and his wife for a long time? A. That is right.

(Testimony of Jane White.)

Q. How long have you known them?

A. Well, all of my life.

Q. Where do you live?

A. Kooskia, Idaho.

Q. And they lived there? A. Yes.

Q. How did they get along together?

A. Perfectly very well.

Mr. Brown: Objected to.

The Court: She may answer. [67]

Mr. Felton: (Q.) How did they get along together? A. Very well.

Q. And what sort of person was Levi?

The Court: I didn't understand that.

Mr. Felton: The damage feature.

The Court: You may answer.

A. He was very nice and good person and very industrious.

Mr. Felton: (Q.) Did he drink?

A. No, he didn't.

Q. Did he work? A. Yes.

Q. What did he work at?

A. He was a logger and worked in the logging camps.

Q. And how much of the year did he work?

A. He didn't work steadily. He worked four or six months of the year and he would take care of the ranch too.

Q. What relation are you to Lottie Frank here?

A. She is my sister.

Q. And you live at Kooskia also?

A. Yes, I live in Kooskia.

(Testimony of Jane White.)

Q. And Titus had a ranch up the river there?
A. Do you mean Levi?
Q. Yes, Levi? A. Yes. [68]
Q. Where was that?
A. That was five miles up from Kooskia.
Q. What kind of ranch was that?
A. Just a little truck ranch.
Q. What did Levi do with his money?
A. Well, he supported the family.
Q. Did he take good care of them?
A. Very good.
Q. What kind of home did he provide for them?
A. Nice home.
Q. Has your sister got any other support?
A. Well, my mother is staying with her.
Q. On her own; has she got any other money?
A. No, not that I know of.
Mr. Felton: That is all.

Recross Examination

By Mr. Brown:

Q. You are a Tribal Indian, are you?
A. What?
Q. Are you a Tribal Indian? A. Yes.
Q. You are of the Tribal Indians?
A. Yes.
Q. You have your Tribal funds?
A. Yes. [69]
Q. For the Nez Perce's? A. Yes.
Mr. Brown: That is all.

(Testimony of Jane White.)

Re-direct Examination

By Mr. Felton:

Q. Now, you have got the words "Tribal funds" here among the Nez Perces. Is there any Tribal funds?

A. I don't know anything about it. Some people own lands, own ranches.

Q. I know that the Tribe itself doesn't have any money? A. No.

Q. And the Tribe itself doesn't give you any money because you are a Tribal Indian, does it?

A. No.

Mr. Felton: That is all.

(Witness excused.)

The Court: I think the Court will recess at this time, before you call another witness, until one-thirty.

Afternoon Session, Wednesday, May 8, 1946, 1:30 o'clock, p. m.

RACHAEL WILSON

called and sworn as a witness in behalf of the plaintiffs, testified as follows:

Direct Examination [70]

By Mr. Felton:

Q. And your name is Rachael Wilson, is it not?

A. Yes, it is.

(Testimony of Rachael Wilson.)

Q. And where do you live, Miss Wilson?

A. I live at Kamiah, Idaho.

Q. Are you one of these Tribal Indians that counsel for the defendant has been talking about?

A. Yes.

Q. And what education have you?

A. I have had two years of college.

Q. Do you know Lottie Frank?

A. Yes, she is my first cousin.

Q. And do you know the other plaintiffs here, Mr. and Mrs. Corbett? A. Yes, I do.

Q. Are they any relation to you?

A. No, they are not.

Q. Were you with them on the night of September 8th and the morning of September 9th?

A. Yes, I was.

Q. And did you go with them to Goldendale?

A. Yes.

Q. And you heard the testimony here that coming back from Goldendale and stopped on the Northside Highway, it is called? [71]

A. Yes.

Q. And when you stopped what did you girls do?

A. Well, we had to get out—well, nature was calling and so we got out.

Q. Go ahead and tell what happened.

A. We walked behind the car and we walked back down the road and when that was finished we walked back to the car, and Levi was there and he started walking back with us, and we were in single file and I was in the lead, and Jane was

(Testimony of Rachael Wilson.)

with us and then Martha, and Levi was the last one coming behind us.

Q. What part of the highway were you on?

A. We were on the river side on the gravel because——

Q. You heard the state patrolman testify to the fact that there was black top and then the gravel shoulder? A. What is that?

Q. Black top and gravel shoulder there?

A. Yes.

Q. Was it the shoulder you were walking on?

A. Yes, we were on the shoulder.

Q. Were any of you on the black top?

A. No.

Q. When did you first see Mr. Wilkerson's car approaching?

A. Well, I saw the car coming but I figured we were far [72] enough off of the road and I figured that we would be all right, and——

Mr. Brown: If the Court please, we object to this volunteer testimony, and move to strike it out.

The Court: The motion to strike will be granted. She should state what happened at the time they were walking there.

Mr. Felton: (Q,) You heard the patrolman testify as to there being some hill there?

A. Yes.

Q. Did you see the car coming as it came over the hill? A. Yes.

Q. And from the time it approached and until it hit you, what happened, if it did hit you?

(Testimony of Rachael Wilson.)

A. Well, I just saw the car coming and we were on the gravel, and I thought we were clear out of the way for the car to come near us and the first thing I knew my hand flew back.

Q. Was your hand hit? A. Yes.

Q. And was it hit hard?

A. Yes, it was broken.

Q. Where was it broken?

A. Up above this joint.

Q. In other words, you are pointing to the joint of [73] your first finger, and that is pretty well on the upper part? A. Yes.

Q. It is where the first finger joins the hand?

A. Yes.

Q. That is on your right hand?

A. Yes.

Q. What happened to the rest of your companions?

A. Well, I turned around and I saw Jane standing there and the rest of them were down there and I could hear "Mart" moaning down there, and just as I turned around I heard Jane call Titus.

Q. And then what did you do?

A. I walked down to where Levi and "Mart" was.

Q. And where were Levi and Martha?

A. Martha was down in the willows and Levi was lying with his head towards the highway.

Q. Did you look at his legs? A. Yes.

Q. What did you see?

(Testimony of Rachael Wilson.)

A. Well, this leg was across this way (illustrating).

Q. Which leg? A. This leg.

The Court: If you will indicate which leg you are referring to, whether the right or the left, the reporter can get it in his notes. [74]

A. It was the right leg.

Mr. Felton: (Q) It was his right leg, and did it tear at a joint or between joints?

A. Well, I really—all I looked at was his right leg for a while which was over his left leg.

Q. Crossed over? A. Yes.

Q. Did he say anything or do anything?

A. No, he didn't.

Q. How long was it before you ascertained that he was dead?

A. Well, we never figured he was dead then. We tried to talk to him and say something to him but he didn't talk and Jane was there with him.

Q. And where was Martha?

A. She was in the ditch.

Q. Did you go down to where Martha was?

A. Well, I just went down to look and came back because it was such an awful thing.

Q. Could you see her foot?

A. Well, I could see the blood and "Ty" had a flashlight.

Q. How was her foot?

A. Well, I could see the blood and that was all I wanted to see.

(Testimony of Rachael Wilson.)

Q. Did you see Mr. Dickerson—pardon me, the name is [75] Wilkerson.

A. No, I never did see him.

Q. Did he come down where Martha was, at all?

A. I never did see him go anywhere near her.

Q. Do you know how many people were in this death car?

A. No, I don't know how many people.

Q. Did you see where the car went to?

A. Well, I saw it parked down on the left side of the road facing Goldendale.

Q. Now, you heard some cross examination about some soldiers being around there. Did you see any soldiers around there?

A. There was positively no soldiers talking to us.

Q. Do you know when they moved the car that you got out of before they went down the road?

A. No, because we had gotten out of the car when they moved out.

Q. How did you get to The Dalles after the accident was over?

A. What is that?

Q. How did you get to The Dalles after the accident?

A. Well, a patrolman took us there.

Q. Mr. Hyland?

A. No, I don't remember whether it was or not.

Q. Some patrolman took you? [76]

A. And he took us on account of Jane's hand

(Testimony of Rachael Wilson.)

was cut badly and she had to have medical attention.

Q. Your hand was treated later?

A. A week later.

Q. How badly was Jane's hand hurt?

A. It was cut there. (indicating)

Q. You are talking about the right thumb where it joins on to the hand? A. Yes.

Q. Is that where you are talking about, the thumb on the right hand? A. Yes.

Q. We are trying to keep a record here so that the court reporter's record is good and we can put it into words. Now, you say that Lottie is your cousin? A. Yes.

Q. And did you know Levi.

A. Yes, quite well.

Q. And have you visited there at their home?

A. Yes.

Q. Where do they live?

A. Kooskia, Idaho. They have a ranch five miles up the river from Kooskia.

Q. What kind of ranch do they have up there?

A. Well, they have their own garden and they had a [77] lot of cattle at one time.

Q. And did Levi work? A. Yes, he did.

Q. How steadily?

A. About six months of the year because he had to take care of putting in the garden.

Q. And where did he work?

A. He was a logger.

Q. Was he industrious?

(Testimony of Rachael Wilson.)

A. Yes, he was.

Q. How old was he at the time of his death?

A. I think he was thirty-five years old. I couldn't say for sure.

Q. And what did his family consist of?

A. Well, there was his wife and then they have —well, her mother is there and she was taking care of two little girls for her brother.

Q. What did Levi do with his money that he earned?

A. He gave it all to his wife.

Q. In other words, he took care of his family with it? A. Yes.

Q. And does Lottie have any income of her own?

A. No.

Q. Was she dependent upon her husband for support, then? A. Yes. [78]

Q. At the time of his death was Levi a drinking man or a sober man?

A. No, he was a sober man.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Didn't he have anything at all to drink that day? A. No, he never did.

Q. Not a thing? A. Not a thing.

Q. And you did not? A. No.

Q. You hadn't had a thing to drink?

A. No, I hadn't that day.

(Testimony of Rachael Wilson.)

Q. And, yet, you didn't see two soldier sometime before the accident?

A. There was positively no soldiers talking to us.

Q. Did you see any soldiers there in the vicinty?

A. No, I didn't.

Q. You didn't see them just prior to the accident? A. No.

Q. Well, was there a car that drove up prior to the accident and stopped?

A. Well, there might have been to tell them to move [79] out of the highway that had before but they never talked to us, there was no soldiers talking to us.

Q. I couldn't get that. There might have been that told who to move out of the highway?

A. There was no soldiers talking to us.

Q. You first said there might have been someone that told them to move out of the highway, is that right?

A. I was talking about the car.

Q. Now, you and Jane and Martha were over in the center of the highway for a while?

A. No, we walked across the highway to come back up the right side for pedestrians to be walking on.

Q. Now, this car of yours, was it moved right after the accident or before?

A. It was moved right after we got out of the car and then they pulled away.

(Testimony of Rachael Wilson.)

Q. It was moved just after you got out of the car? A. Yes.

Q. Who was left in the car?

A. There was Roy Whitaker and Titus Corbett.

Q. As a matter of fact, didn't Titus Corbett slump over and go to sleep when you got out of the car? A. Who; Titus?

Q. Yes.

A. No, he didn't, I wasn't there. [80]

Q. As you walked up the highway you say you were in the lead?

A. When the accident happened?

Q. Before the accident happened?

A. Oh, before the accident happened?

Q. Is that true; you were in the lead?

A. Well, ——

Mr. Felton: I think she is confused over which time you are talking about.

Mr. Brown: Q. When you were returning to the car just before the accident.

A. When we were returning to the car?

Q. Yes. You were in the lead?

A. Yes, I was in the lead.

Q. And you say you were on the three-foot shoulder, is that right? A. Yes.

Q. And just back of you was Martha, is that right?

A. No, Jane was just back of me.

Q. And back of Jane was Martha, is that right-

A. Yes.

Q. And back of Martha was Levi?

(Testimony of Rachael Wilson.)

A. Yes.

Q. Now, how did you know that they weren't on the road, you were in the lead? [81]

A. I would look back once in a while to see.

Q. Oh, you were looking back from time to time? A. Sure.

Q. Now, how far apart were you as you walked up the road?

A. Well, we were just right behind each other.

Q. Now, isn't it a fact that Levi and Martha were about the center of the road and he was supporting her coming up there?

A. They were not.

Q. You are sure of that too, aren't you?

A. I am sure of that.

Q. And after the accident you didn't talk to a soldier there?

A. I was so shocked after the accident I don't know.

Q. By the way, have you taught school?

A. No.

Q. Did you tell them that night that you were a school teacher?

A. I told the patrolman.

Q. Did you tell anyone there?

A. The patrolman.

Q. Did you?

A. The patrolman because I talked to him.

Q. Who did you tell? [82]

Mr. Felton: Now, wait a minute——

Mr. Brown: Just answer the question.

Mr. Felton: Now, don't answer until I object.

(Testimony of Rachael Wilson.)

Mr. Brown: Q. Who did you tell that you were a school teacher?

Mr. Felton: If the Court please, we object to this as improper cross examination, and if it is an impeaching question the ground of impeachment isn't laid.

Mr. Brown: If you Honor please, this is part of the res gestae and I want to show who she did talk to, whether the witness talked to the patrolman.

Mr. Felton: The patrolman didn't come until two hours after the accident and it isn't part of the res gestae.

Mr. Brown: Now, she admits that she talked to some man and told him she was a school teacher.

The Court: If you wish to lay the ground for the impeachment, you should fix the time and place and persons present.

Mr. Brown: Q. All right, immediately after the accident you were talking to someone and you told him you were a school teacher.

Mr. Felton: That isn't an impeaching question.

The Court: The objection overruled, as referring to the time immediately after the accident.

A. Yes, I was talking to the patrolman. Outside of [83] that time I was down there with Levi and with Jane most of the time, and I don't know who all were around there.

Mr. Brown: Q. Did you talk to any man in uniform before the patrolman came?

A. No, I never did.

Q. Didn't you talk to Mr. Wilkerson?

(Testimony of Rachael Wilson.)

A. No, I don't even know what he looked like or where he was.

Q. Do you remember this, Miss Wilson, do you remember Mr. Wilkerson attempted to get the name of a man in your presence and the man refused to give his name, the man in uniform, and you told this man to keep his mouth shut and not to tell anything?

A. I was so shocked that I just didn't know.

Q. Do you deny it happened?

Mr. Felton: If the Court please, we object to that as improper impeachment. He must lay the foundation.

The Court: Objection overruled.

Mr. Brown: Q. Now, that may have happened? That may have happened? Do you understand my question? A. No.

Q. Now, which do you mean, that you didn't say that, or that you don't remember?

A. I was talking to the patrolman. That is the only one that I talked to about the accident. [84]

Q. Now, Miss Wilson, confine yourself to my question. You have had two years in college. I understood you to say that immediately after the accident you were so shocked that you didn't remember. Is it the fact that you did talk to him or you were so shocked that you don't remember?

A. I was shocked after the accident.

Q. Then, you might have had such a conversation immediately after the accident?

A. I might have had but——

(Testimony of Rachael Wilson.)

Q. That is what I am asking you.

A. Yes.

Q. Now, you say you noticed Martha's leg as she lay in the ditch? A. Yes.

Q. Which leg of her's was injured?

A. It was the left leg.

Q. Yes, she is wearing a brace on the left leg, isn't she? A. Yes.

Mr. Brown: That is all.

Redirect Examination

By Mr. Felton:

Q. Now, do you remember having any conversation with any soldiers immediately after the accident? [85]

A. No, I never had any conversation with any soldiers.

Q. And the only conversation you had was a patrolman? A. Yes.

Q. And that was about two hours after the accident? A. Yes.

Q. Did you see any soldiers around there immediately after the accident?

A. I don't remember who all was around there after the accident.

Mr. Felton: That is all.

Recross Examination

By Mr. Brown:

Q. Miss Wilson, do you recall seeing any soldiers there before the accident?

(Testimony of Rachael Wilson.)

A. No, I don't because we didn't see any soldiers.

Q. Do you remember a car coming up and stopping before the accident?

A. No, I don't.

Q. And some one getting out of the car and talking to you——

Miss Bacharach: Isn't this repetition?

The Court: This is repetition. She said she didn't remember anyone. What was the question?

(Last questions read.)

Mr. Brown: If the Court please, I am going to insist upon one counsel at a time upon one witness. Q. The question is: Before the accident do you remember the car coming up and stopping?

Mr. Felton: If the Court please, that is repetition, and I object to it.

The Court: Objection sustained.

Mr. Brown: If the Court please, I don't believe that that was gone into before.

The Court: It is my recollection of the testimony that this witness testified that after she left the car and started back along the highway she saw no other car and saw no soldiers.

Mr. Brown: I was mistaken as to what she covered. I will withdraw the question.

The Court: Any further questions?

Mr. Brown: No. No, your Honor.

Mr. Felton: No, no questions.

The Court: Call the next witness.

ROY WHITAKER,

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton: [87]

Q. You name is Roy Whitaker, is it not?

A. Yes, sir.

Q. Where do you live, Mr. Whitaker?

A. Nez Perce, Idaho.

Q. And do you know Lottie Frank?

A. Yes, sir.

Q. Did you know her husband Levi?

A. Yes, sir.

Q. And do you know Martha and Titus Corbett?

A. Yes, sir.

Q. How long have you known Lottie and her late husband Levi? A. Since 1942.

Q. Were they friends of yours?

A. Yes, sir, very good friends.

Q. And you were in this car that we have been talking about that stopped on the north side of the road down near the Columbia River on the night of September 8th and 9th, were you?

A. Yes, sir.

Q. And you were one of the passengers in it?

A. Yes, sir.

Q. You heard the testimony as to how many passengers were in it, have you not?

A. Yes. [89]

(Testimony of Roy Whitaker.)

Q. And you have heard how you were located in the car? A. Yes.

Q. Is that all true? A. That is right.

Q. Where were you after these girls all got out of the car.

A. I was in the front seat, sitting on the right hand side.

Q. I think you are talking a little too low. I see that the Judge is moving over to listen to you. Where were you?

A. I was sitting in the front seat on the right hand side.

Q. And who was there with you?

A. At what time?

Q. Just after the girls got out?

A. There was Levi Frank, Titus Corbett and myself, all in the front seat.

Q. What happened after the girls got out with reference to another car coming up?

A. There was a car that pulled up behind us and said that was a dangerous part of the road there and——

Q. And what was done?

A. Immediately we pulled up to this driveway, and who was in that car, I couldn't say. I couldn't say who it was. [89]

Q. And then, was there any other car that came along after the accident?

A. Only the car coming east is the only one I saw.

Q. When did you first see this death car?

(Testimony of Roy Whitaker.)

A. After Levi Frank went out and went back there, Titus and I was in the car together. We seen the car coming.

Q. How was it coming?

A. Coming pretty fast and when I first seen him I glanced up and in the distance it looked like he got one light.

Q. What did Titus do?

A. I noticed Titus. I don't know whether he noticed that or not but he said, "I am going to blink my lights."

Q. All right, keep out what was said.

A. But he did blink his lights at that time.

Q. But the car came on by, did it?

A. At that time he said something to me and attracted my atention and I did see it pass, yes.

Q. And then what happened?

A. It wasn't long until we heard this scream from some woman, some woman screaming, and I couldn't tell which one it was.

Q. What did you and Titus do?

A. Titus got out and run and, of course, I am crippled and I got out as fast as I could. [90]

Q. Let us go back a minute. In my questioning I seem to have forgotten Levi. And when did Levi get out of the car?

A. Right after we pulled up into this driveway.

Q. And, then, there was only two of you left in the car at that time?

A. Yes, when they passed us.

(Testimony of Roy Whitaker.)

Q. Did Levi get out before you got into the turn-out or just after?

A. He got out just after we pulled into the turn-out.

Q. We got you to where somebody screamed, and you and Titus went up the road, and when you went up, back up the road, how far did you get, how far did you go?

A. Oh, I imagine a distance of maybe 200 or 250 feet or such a matter.

Q. You heard the patrolman Mr. Hyland testify, and you saw him draw this map, did you?

A. Well, that is just about correct.

Q. It is approximately correct, is it?

A. It is approximately correct, yes, sir.

Q. Then, at the time that you got there, tell the Court where Levi was lying.

A. He was lying there—well, between the hard surface and the shoulder is a narrow space of gravel probably two feet wide and then it tapers off into a ditch, and he was [91] lying on the incline of this ditch with his head towards the highway.

Q. Did you take a look at him? A. Yes.

Q. Did you go near him? A. Yes.

Q. What did you find?

A. His right leg looked like it was broken, double bent and his ankle was over his left leg.

Q. That was broken about midway between the ankle and knee? A. Just about.

Q. Between the right ankle and knee?

A. Yes.

(Testimony of Roy Whitaker.)

Q. Did you see any other marks?

A. I could see blood and marks on his ears.

Q. And where was Rachel Wilson at that time when you got back there?

A. She was standing right across close to Levi and Jane was near them.

Q. Did you go near Martha?

A. No, because it was kind of rough down in there and I can't walk too well and I couldn't get off of the edge of the shoulder.

Q. Did you see any of the people in the car, from that [92] other car?

A. Just that gentleman right there (indicating).

Q. That gentleman is who?

A. Right behind you.

Q. That is Mr. Wilkerson?

A. Yes, Wilkerson, yes.

Q. Did he say anything to you about his car? Well, let us go back a minute. Let us get this more nearly in order. I am ahead of myself again. Did you look at his car?

A. Not at that time, no.

Q. Did you later look at his car?

A. After they backed it up and put it on the other side of the road.

Q. When was that?

A. That was after the accident was practically cleared away and the sheriff and patrolman moved it off on the left hand side of the road.

Q. Did you look at his car? A. Yes.

Q. What did you find?

A. A few dents in the right fender and one

(Testimony of Roy Whitaker.)

near the windshield and the right headlight was broken.

Q. What was the lamp in the right headlight like? A. Just the reflector there.

Q. How was the bulb? [93]

A. I imagine it was still intact.

Q. Did you see any headlight glass around there? A. No, I didn't.

Q. Did you ask Mr. Wilkerson anything about that fender?

A. I think—I don't remember if I ask him or not. It seems as if someone asked him about this and he said that had happened before the accident.

Q. He said the fender had been damaged before this accident, and also the headlight?

A. Yes.

Q. Was there any other mark on the cowl of the car or thereabouts?

A. There seemed to be one in the right hand corner of the windshield or thereabouts.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Did you go out of the car just after you heard this scream or did someone come up to the car?

A. I got out of the car after Titus jumped out and I couldn't run in the dark and I had to walk and pick my way down. It takes a little time.

Q. I couldn't get it. Will you speak a little

(Testimony of Roy Whitaker.)

lounder, please. Did you talk to Mr. Whitaker that evening? [94]

A. Yes, that evening.

The Court: You mean Mr. Wilkerson.

Mr. Brown: Q. I mean, Mr. Wilkerson; did you talk to him that evening?

A. I seen him on the highway.

Q. Didn't he ask your name?

A. Oh, yes, I remember he asked me if I would sign my name for a witness, and I signed some kind of name, and I don't remember what kind of name, and I don't know who the gentleman was.

Mr. Brown: If the Court please, I insist that he be responsive to the questions and speak up.

Q. He asked you your name?

A. He asked me if I would sign as a witness and he handed me a paper. I didn't sign my name.

Q. You signed a name?

A. I signed another name.

Q. You gave the name of "C. E. Brown"?

A. For some other purpose.

Q. Did you come from Idaho for this purpose, what did you come for?

A. I came down from Idaho with Levi after a load of fine salmon.

Q. You came down with these people?

A. Yes, from Kooskia. [95]

Q. You had been with them all the while they were there? A. I didn't understand.

Q. You had been with them while they were at Celilo? A. Yes, sir.

(Testimony of Roy Whitaker.)

Q. And you had been up on this party at Goldendale? A. Yes, sir.

Q. Now, when did you say that Levi got out of the car?

A. As near as I can remember, right after we pulled into that driveway.

Q. And you believe that that was before the accident that you pulled into the driveway?

A. I don't believe it; I know it.

Q. It was your direct examination that it was before the accident? A. Yes.

Q. And you say that there was a car that stopped there just before you pulled up?

A. Yes, just before we pulled up there it stopped and they asked us to move to a wider place in the road.

Q. Did you see the men in that car talk to the women and to Levi?

A. No, I didn't.

Q. Do you know where Levi and the women were at that time when that car stopped?

A. Behind the car some place. I don't know where. [96]

Q. As far as you know, they may have been in the center of the road?

A. Levi was with us but the women may have been back down in the road somewhere.

Q. Which is your correct name, Whitaker or Brown? A. Whitaker.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

M. A. POWELL

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. And you name is M. A. Powell, is it?

A. Yes.

Q. P-o-w-e-l-l (Spelling)?

A. Yes, sir.

Q. And where do you live, Mr. Powell?

A. I live at Lapwai, Idaho.

Q. And who do you work for?

A. I work for the United States Government.

Q. In what official position?

A. Agricultural Extension Agent for the United States [97] Indian Service.

Q. With what Indian Service are you now connected with?

A. Northern Idaho Agency comprising four reservations.

Q. Does the Nez Perce Reservation come within your jurisdiction? A. It does.

Q. How long have you worked for the United States Government?

A. About thirty-five years—No, twenty-five—twenty-seven. I will get it right after a while. Twenty-seven years.

Q. How long have you worked in this Indian work?

A. Indian work for seventeen years.

(Testimony of M. A. Powell.)

Q. How long have you been acquainted with the Nez Perce Indians?

A. About fourteen years.

Q. Your location is at Lapwai, is it not?

A. Yes, sir.

Q. Lapwai is about how far out of Lewiston?

A. Between fourteen and fifteen miles from Lewiston.

Q. Outside of Mr. Whitaker who is not an Indian, are these other people Tribal Indians?

A. Yes.

Q. All of them? A. Yes, sir.

Q. Then, this place of Kooskia, Idaho, how far is that [98] from Lapwai?

A. Oh, let me see, about—let me see, sixty-five and ten is seventy-five and—about seventy-five miles, approximately.

Q. Do you have occasion to go there frequently in your work?

A. An average of once a month.

Q. Did you have occasion to come in contact with Mr. and Mrs. Levi Frank in the last few years? A. Yes.

Q. And how often?

A. Well, I would say that I would see them eight to ten times each year.

Q. Do you know Levi Frank?

A. Yes.

Q. And do you know his family?

A. Yes, sir.

Q. Have you visited in it? A. Yes, sir.

(Testimony of M. A. Powell.)

Q. And what kind of person was Levi Frank; in other words, how old was he?

A. He was—I would guess—I would say right off, he was thirty-five or thirty-six years old. He was well liked and he was rather industrious.

Q. And I will go on and ask you this and pick this up [99] and the other attorney's objection to this——

Mr. Brown: I haven't objected.

The Court: There was no objection.

Mr. Felton: I am anticipating. There was an objection before. Q. What was his condition of health?

A. He was in very good health.

Q. And what was his character, his industry and prudence, if you know it?

A. Well, I would consider him above the average. He was a good worker.

Q. When you talk about above the average, are you talking about in ordinary whiteman's standards or simply Indian standards, or which?

A. Well, ——

Q. Did he compare favorably with a whiteman working and so on?

A. He would compare very favorably with any whiteman, yes.

Q. And what did he work at?

A. Well, he was working on the ranch up there and he had twenty-five or thirty head of cattle and had to provide Winter feed for them and take care of them during the summer time, and he also done

(Testimony of M. A. Powell.)

odd jobs around for other farms and he also worked in the woods during some of the time.

Q. How about his drinking habits? [100]

A. Sir?

Q. How about his drinking habits, did he drink liquor?

A. About when I first knew Mr. Frank he did occasionally drink. The last five or six years Mr. Frank never did any drinking.

Mr. Brown: That you know of?

Mr. Felton: Let the man testify.

Mr. Brown: He can't testify except to his own knowledge.

The Witness: That is right. That is right, to my knowledge. He was never drunk when I ever saw him in the last five years.

Mr. Brown: That is what I am getting at.

Mr. Felton: Q. And people that drink on the reservation, you people at the Agency know about them, don't you?

A. I know every one that does.

Q. How about his wife Lottie, do you know her?

A. I know Lottie, yes.

Q. Upon what does she live; did she have a separate income or did she live upon her husband's industry?

A. She had no other income except what her husband provided.

Q. She was dependent upon him for support?

A. Yes, as far as I know, yes.

Q. Did they live together? [101] A. Yes.

(Testimony of M. A. Powell.)

Q. As man and wife in the family?

A. Yes.

Q. Now, the words "Tribal Indian" have been used here. Does that have any significance as to income?

A. That has no significance as to income that Indians receive.

Q. As to any of these people? That is as to any who have been here, these Nez Perce people; do any of them receive any income from the Tribe?

A. No.

Q. Did either Lottie Frank or her husband Levi have any allotment from the Government?

A. No.

Q. I will ask you then directly if Levi and Lottie Frank were not dependent upon the produce of Levi's industry? A. Yes, I would say yes.

Q. You saw Levi after he was dead, didn't you?

A. Yes, sir.

Q. And what was the occasion of it?

A. Well, I—we come—Mr. Warmel, our Indian officer, asked me to come down with him when they heard about this death and we went into the undertaker's and I saw Mr. Frank's body in the undertaker's.

Q. Was it clothed at that time? [102]

A. Yes.

Q. What was the condition of his body as to injuries you saw there?

A. Well, the undertaker showed us his broken leg and the crushed skull.

(Testimony of M. A. Powell.)

Q. The crushed skull was crushed where?

A. At the back.

Q. How high?

A. Well, it was right around there (indicating).

Q. About ear level, would you say?

A. Yes, ear level, that is about as near as I could say.

Q. Directly at the back of his head?

A. No, I think it was more to one side—well, I couldn't tell. The whole back of it was then bruised.

Q. Did you then go to Mr. Wilkerson's place somewhere and see the automobile, the death car?

A. Yes, sir.

Q. And in what condition was that car?

A. Well, the right front fender and headlight had been damaged.

Q. Was there any damage on the cowl of the car?

A. I couldn't say as to that. The officer that was with me made the examination carefully and I didn't notice anything on the——

Q. Which leg was broken? [103]

A. The right leg was broken.

Q. And where?

A. Well, between the knee and the hip.

Q. The big bone between the knee and the hip?

A. Yes.

Mr. Felton: I see. All right, you may inquire.

(Testimony of M. A. Powell.)

Cross Examination

By Mr. Brown:

Q. Now, you say that they lived on a ranch, a farm? A. Yes, sir.

Q. Was that farm on the reservation, in the Nez Perce Reservation?

A. It is without the—you will have to define that question a little more because the reservation boundary—because this ranch is without the reservation boundary.

Q. It is outside of the reservation boundary?

A. The present reservation boundary. I will say it that way.

Q. But it was formerly inside the reservation?

A. Yes, sir.

Q. Who owns the ranch, the Government or them? A. It is owned by the Indians.

Q. How did they acquire title to it?

A. Fee patent was issued to them. [104]

Q. Then, if they have fee patent to the land, do you still regard them as Tribal Indians in Idaho? A. Yes, sir.

Q. And that was the original allotment of one of these people? A. Yes, sir.

Q. Was it an allotment to him or to his wife, if you know?

A. Well, it wasn't the allotment of any of these people. It was their—somebody before they came—it was either their mother's or father's, I don't know.

(Testimony of M. A. Powell.)

Q. Then, you don't know whether it was Levi or his wife?

A. Well, it was his wife's relatives.

Q. It came through his wife's relatives and so it was her property? A. Yes, sir.

Mr. Felton: Mr. Brown, I will clear it up with Mrs. Frank a little bit.

Mr. Brown: I want to clear it up with this witness.

Q. Now, had Levi himself ever received an allotment? A. No.

Q. Aren't there still Tribal lands in the reservation? A. Yes.

Q. Owned by the Tribe? A. Yes, sir.

Q. And then there is revenue coming in?

A. Yes, sir.

Q. And then there is timber and——

A. Well, they get some money for timber and mines and farm land.

Q. As a matter of fact, the Nez Perce Reservation is considered one of the valuable reservations in Idaho?

A. Well, if you would permit me, I would like to explain that it isn't a closed reservation. It isn't a closed reservation the same as Yakima. We have white owned and Indian owned lands.

Q. Yes, I understand that, but there is still a lot of land owned by the United States Government in trust for the Indians?

A. Yes, land which the Government holds in trust.

(Testimony of M. A. Powell.)

Q. That the Government holds the title in trust for the Indians? A. Yes, sir.

Q. And both Lottie and Levi are members of that tribe? A. Yes, sir.

Q. And beneficiaries of that trust?

A. Yes, sir.

Mr. Brown: That is all.

Q. Oh, you say that there was personal property and cattle and soforth, was that owned by Levi or by Lottie? [106] A. Both of them.

Q. Both of them together? A. Yes, sir.

Q. What would you say would be the value of it, have you any idea?

A. The cattle or real estate?

Q. The cattle.

A. Well, that is approximately thirty head worth seventy dollars or $2100.00.

Mr. Brown: That is all.

Redirect Examination

By Mr. Felton:

Q. Now, Mr. Powell, coming back to these Tribal Indians, do the individual members of the Tribe get any benefit out of the lands?

Mr. Brown: If the Court please, I object to that as calling for a legal conclusion. I think your Honor is thoroughly familiar with the law as to the Tribal Indians.

The Court: We have gone pretty far into this. I will permit him to answer.

The Witness: Not directly.

(Testimony of M. A. Powell.)

Mr. Felton: Q. The money is put into the fund, is it not?

A. We have approximately $200 of Tribal funds but that [107] is used for Tribal enterprises as a benefit to the entire group, and for loans. They can get loans. They make loans to the individual Indians.

Q. But as far as Lottie getting any money to live on out of these Tribal funds, she doesn't get any? A. None whatsoever.

Mr. Felton: I have no further questions.

The Court: Any further questions?

Mr. Brown: No.

The Court: You may step down.

LOTTIE FRANK,

a plaintiff herein, was recalled as a witness on her own behalf, and testified as follows:

Direct Examination

By Mr. Felton:

Q. Mrs. Frank, how long have you and Levi Frank been married?

A. We lived together eight years.

Q. As husband and wife? A. Yes.

Q. Now, we are talking about this ranch up the river. Whose ranch is that, that you live on?

A. It belongs to my mother. [108]

Q. Is she still living? A. That is right.

Q. How many children has she?

A. Has my mother?

(Testimony of Lottie Frank.)

Q. Yes. A. Seven.

Q. And how big a ranch was it?

A. Eight acres under cultivation and about eighty acres of pasture.

Q. Now, what kind of country is that; does it lay in a deep canyon or on a hillside, or where?

A. Just along the river.

Q. That is on the Middle Fork of the Clearwater River? A. That is right.

Q. Is that river there running through a deep canyon? A. Yes.

Q. And that eight acres lies in the bottom of the canyon, does it? A. Yes, sir.

Q. And the pasture is on the hillside, is that right? A. Yes, sir.

Q. How many cattle did you and Levi have at the time of his death? A. Thirty head.

Q. And were all of those yours? [109]

A. No.

Q. Whose cattle were they?

A. They belonged to the Government I. D. Department—Indian Department.

Q. They were Indian Department cattle?

A. Yes.

Q. You get them in the form of a loan?

A. Yes, sir.

Mr. Brown: Let her testify.

Mr. Felton: Q. What has happened to those cattle; have you got them yet? A. No.

Q. Have you got any income from any source except the possibility of recovery in this case?

(Testimony of Lottie Frank.)

A. No, I have not.

Q. How old was your husband at the time of his death? A. Thirty-five.

Q. And what was his condition of health?

A. He was in good health.

Q. Had he ever had any sicknesses?

A. Never.

Q. How big was he?

A. Five feet, eight inches, and he weighed one hundred and—(witness cries).

Q. Just go on, Mrs. Frank, let us go on through this. [110] I know it is hard on you, but let us go on through. About how much did he weigh?

A. About 175 pounds.

Q. Did he work?

A. Yes, sir.

Q. What kind of living did he earn for you?

A. A good living.

Q. Did you work while he was alive?

A. No.

Q. Have you any trade or occupation of your own? A. No, I don't have any.

Q. What kind of work did he do?

A. Well, he kept the ranch agoing and then he would work out in the logging camps.

Q. About how much of the year did he work in the logging camps?

A. Oh, six or seven months of the year.

Q. Do you know about what he earned out there?

A. Oh, about two hundred dollars.

Q. A month? A. A month.

(Testimony of Lottie Frank.)

Q. And then, you had some income from your cattle, did you? A. A little.

Q. And was that sufficient for you to live on nicely? [111] A. That was.

Q. How old are you? A. Thirty-one.

Q. How about Levi's habits as to drinking or not drinking?

A. He used to drink a lot before we were married but after we were married he never drank.

Q. Did he drink anything at all?

A. Oh, I would say that he would take a drink maybe twice a year but not to get drunk.

Q. Then, he wasn't a drinking man?

A. He wasn't a drinking man.

Q. You have a couple of children who have been living with you, don't you?

A. That is right.

Mr. Brown: If the Court please, I am going to object to any further reference to these children. They are not their children and there can be no recovery for them. The statute says that they must be children of the decedent.

The Court: I think I will sustain the objection.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Mrs. Frank, how long had you been married?

A. Eight years.

Q. Now, on this ranch where you live, your mother lives there too? A. Yes.

Q. And her other children?

(Testimony of Lottie Frank.)

A. No, I am the only child of hers that lives there.

Q. But there are other relatives besides your mother that live there on this ranch? A. No.

Q. The only estate that your husband left was your claim, isn't it? A. What claim?

Q. Against Mr. Wilkerson?

A. He didn't leave any.

Q. I mean, you were appointed Administratrix of his estate? A. That is right.

Q. And you testified as to property when you were appointed, and how much property he had, is that true? A. I didn't get the question.

Q. When you were in court you were appointed Administratrix of his estate——

Mr. Felton: Not in Idaho.

Mr. Brown: How was the bond fixed?

Mr. Felton: They don't do it over there. [113]

The Court: I prefer to have you address your remarks to the Court.

Mr. Felton: Pardon me, your Honor, I was just telling counsel that they don't ask that question over in Idaho.

Mr. Brown: Q. Well, did your husband leave any estate at all outside of these borrowed cattle?

A. No.

Q. And you were living on your mother's ranch?

A. Yes, that is right.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

Mr. Felton: I want to call Mr. Hyland back on the stand for a moment and get this exhibit in.

GORDON E. HYLAND,

recalled as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Now, Mr. Hyland, when you were on the stand before and made your drawing on the board I asked you to prepare a drawing on paper which could be for the record, and you have drawn Plaintiffs' Exhibit A, which I am handing you. Is that the same as the other? [114]

A. That is. That is the drawing I prepared.

Mr. Felton: This has been submitted to counsel.

Mr. Brown: Yes. I have no objection.

Mr. Felton: I offer in evidence this Plaintiffs' Exhibit A.

The Court: It will be received.

(Whereupon, drawing of scene of accident, previously marked for identification, was received in evidence as Plaintiffs' Exhibit A.)

Mr. Felton: You may inquire.

Mr. Brown: This will go beyond immediate cross examination. I asked counsel to ask him back for cross examination on his former testimony.

Cross Examination

By Mr. Brown:

Q. Mr. Hyland, you were there with Sheriff Woodward? A. Yes, sir.

(Testimony of Gordon E. Hyland.)

Q. And the deputy was along?

A. Yes, sir.

Q. You were all there? A. Yes, sir.

Q. Did you interrogate this lady up here as the plaintiff here in this case and her two companions about what they had been doing that evening? [115]

Mr. Felton: If the Court please, I believe that is improper cross examination. I asked only about physical facts when he testified here.

Mr. Brown: Well, he said he talked about the accident. He is available to the defense as a witness.

Mr. Felton: If the Court please, this is improper cross examination.

The Court: I think it is outside of the scope of the cross examination of what was asked the witness on direct.

Mr. Brown: I will drop that.

Q. Did you examine the shoulder of this road just west of where the tire marks showed up?

A. Yes.

Q. Did you see where tire marks had been made off of the road?

A. I saw no indication of any vehicle travel on the shoulder of the road.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

Mr. Felton: Now, if the Court please, we come to the place that I rather anticipated where we have Dr. Vogt, and he will be here at three o'clock.

I can't complete my case until the doctor is through, but the doctor promised he would be here at three o'clock. If it is satisfactory and the [116] defendant wishes they can go ahead.

The Court: I think that perhaps the more orderly way would be to recess until three o'clock. You are through except for the doctor's testimony?

Mr. Felton: Yes, I am through except for the doctor's testimony.

The Court: Unless Mr. Brown has a witness he would rather put on, I would rather have the plaintiffs proceed to close their case.

Mr. Brown: I would rather have the case closed because I have a motion.

The Court: Yes.

Mr. Brown: I think, your Honor, it won't make an extra day's time.

The Court: If your witness should come before three o'clock, let me know.

Mr. Felton: I will inform the Court as soon as he comes in.

The Court: Court will recess subject to call.

(Short recess.)

Mr. Felton: I will call Dr. Paul Vogt.

PAUL VOGT,

called and sworn as a witness on behalf of the plaintiffs, testified as follows: [117]

Direct Examination

By Mr. Felton:

Q. Your name is Dr. Paul Vogt?

A. Yes, sir.

(Testimony of Paul Vogt.)

Q. The thing I am handing you is your record that you brought along. You will probably need it for refreshment of memory. And where do you live, Dr. Vogt? A. In The Dalles, Oregon.

Q. What is your business or profession?

A. Physician.

Q. What training did you have in order to get any degrees that you have? A. I have——

Mr. Brown: I will admit his qualifications if you will just inquire how long he has practiced in The Dalles.

Mr. Felton: Q. How long have you practiced at The Dalles?

A. I have been practicing there for four years beginning in 1937, with the exception of being in the Army.

Mr. Brown: I will admit his qualifications.

Mr. Felton: I just want to go into one qualification.

The Court: Yes.

Mr. Felton: Q. You have been licensed, of course? A. Yes.

Q. What kind of work do you do? [118]

A. Orthopedics.

Q. That is roughly what?

A. Bone surgery.

Q. That is the type of work you performed upon Mrs. Martha Corbett? A. Yes, sir.

Q. How long have you practiced orthopedic work?

(Testimony of Paul Vogt.)

A. Over five years. In the service I did that, doing nothing else.

Q. And you returned to The Dalles when?

A. In September, 1945.

Q. And was Martha Corbett one of your patients.

A. Yes, she was.

Q. Do you know from your records and from your statements what her condition was at the hospital?

A. From the records and from the statements of the physician who treated her upon her admission——

Mr. Brown: If the Court please, I am going to object to anything that the other doctor told him concerning her condition.

Mr. Felton: Q. Now, what was the type of injuries she had?

A. She had two main injuries. One was to her back in which she sustained fractures of the transverse processes of the first, second and third lumbar vertebrae. Those are [119] not the main portion of the vertebrae but the small lateral projection to which the muscles in the back are attached. And those three were fractured. And her foot, her left foot was the other part seriously injured, and there she had crushing and vulsing injury to the side and top of the foot.

Q. What was the extent of that injury?

A. The extent of that injury, it involved the skin which was completely destroyed and the skin over the—some of the top and lateral aspect of the

(Testimony of Paul Vogt.)

foot and ankle had lost its circulation and died. Beneath that the soft tissues were also also injured and that gravel and sand and weeds or whatever it happened to be, such articles as that, were ground into the soft tissues. Also, several tendons were severed, by name the paranies longus and bevis. The function of those particular tendons is to pull the foot laterally so that there will be abduction, you call that abduction, and it is help raise it up. Also, there was a fracture of the base of the fifth metatarsal. That is one of the small bones of the foot.

Q. Then, there were some bones in the foot broken

A. I said there was a fracture of the base of the fifth metatarsal.

Q. What treatment was given to her?

A. On admission the wound was thoroughly cleansed, and all the foreign material in the way of gravel was removed, together with other like substance, and it was thoroughly [120] washed and she was given tetanus anti-toxin and the attempt was made to suture down and extend the flap of skin that had evulsed. However, that did not remain and had to be removed. However, the tendons were sutured. The fracture was not sufficiently severe as to require reduction. As the original skin did not hold it was necessary to do a free skin graft, which was done.

Q. What does that consist of?

A. The skin graft is called full thickness graft.

(Testimony of Paul Vogt.)

The skin which wasn't the full thickness was replaced by skin from the thigh and was placed over the granulated portion on the foot after that had been cleared off.

Q. You cut a piece of skin off the thigh and put it on the foot? A. Yes, that is right.

Q. Go ahead, Doctor.

A. That skin graft held very well, and following that it was recommended that she obtain a drop-foot brace, what we call a drop-foot brace, inasmuch as the tendons had been injured and as this function of them did not return the foot did not—the foot tended to drop as she walked. Also, there was still due to the loss of soft tissue some tendency of the foot to swell. This is the condition as stated on her discharge from the hospital.

Q. And is this brace she is wearing, is that the brace [121] that you recommended that she get?

A. That is the type of brace that I recommended to prevent the toe from dropping down.

Q. That means that the toe drops down and will not come back up?

A. That is right. She hasn't full muscular power to guide it. She may bring it back but if she walks the limb muscles fatigue and it begins to drop.

Q. And how long will it be necessary for her to wear this brace?

A. If the tendon function has not returned by now, essentially more than six months following the injury, if it isn't back within the next six

(Testimony of Paul Vogt.)

months, I would say that it would be a permanent defect.

Q. And dropping that for a minute until she gets her shoe off, how about her back injury?

A. The back injury consisted, as I said, of the fractures of the first three transverse processes of the lumbar region.

Q. If that still pains her, what does that indicate?

A. Well, those—that may indicate not that the fractures haven't healed but that she may have some—whatever would be causing the pain would be in the nature of soft tissue injury.

Q. Take a look at her foot now here as she has it exposed, and see if it is in the same condition as it was when [122] you left her last; that is, when you last saw her?

A. (Going down to Mrs. Corbett and examining her foot.)

The Court: I will ask you, Doctor, if it will be the most orderly way to make your examination and continue your testimony when you return to the stand.

The Witness: Unless I can illustrate to you here the condition.

The Court: Yes, if you feel you can.

The Witness: There is some scar contracture which prevents full motion causing limitation of motion. Now, if you pull the toes up this way. She has this ability to pull her foot up this way. Now, pull your foot up this way. Now, here is what she

(Testimony of Paul Vogt.)

can't do. The average person can put her foot out to one side and she lacks that motion which is due to the injury. (Returning to witness stand.)

Mr. Felton: Q. Just a moment, this area that shows here is the area where the skin was grafted on her foot? A. Yes.

Q. How much in the way of scar injury or whatever way you compute how much skin was grafted?

A. I don't recall. I don't think we measured it with that idea in mind.

Q. How many operations did it take?

A. It was just a single operation, removing skin from the thigh and suturing it in place. [123]

Q. How about pain in these matters, in the way she was injured, pain and suffering?

A. Do you mean at the time of injury?

A. No, through her hospital life and later on; the pain?

A. Well, that is a difficult question. She had a certain amount of pain. Anyone who sustains that type of injury sustains that pain. However, I don't think she had any more than anyone else.

Q. There is a certain amount of pain attached with it? A. Yes.

Q. And her foot is painful now?

A. She didn't complain of any pain except in stretching the scar.

Q. In your opinion can she ever obtain full use of her foot?

(Testimony of Paul Vogt.)

A. I don't believe that the foot will be normal again.

Q. How about her back?

A. I think—I have not examined her back recently but it is—it is the usual thing that back injuries of that sort do not leave any permanent disability.

Q. They get over it in how long a time?

A. They vary—that varies with the individual case.

Q. And it might consume several years?

A. Well, it may be from a month to years.

Q. Have you got any opinion on the amount of disability [124] that would be caused a mechanic, for instance, she is a mechanic, from this foot and back?

A. That would be difficult to determine without examining her back at this time in detail.

Q. All right, let us leave it and go to the foot itself.

A. The foot will bother her in any occupation where she will be required to do any walking or standing or lifting, you might say.

Q. You called your hospital and got a record of your charges, did you not?

A. That is right.

Q. You are a member of that organization down there? A. Yes.

Q. And you obtained a record of your charges through your office? A. Yes.

Q. What was the medical charge?

(Testimony of Paul Vogt.)

A. $125.00.

Q. What was the hospital and other charges?

A. The hospital charges were $378.70.

Q. And the brace and some other stuff was bought outside by these people.

A. The brace was bought outside and I can't tell you what that was.

The Court: What was the hospital bill again, Doctor? [125]

A. $378.70.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Doctor, did you inquire if those charges had been paid?

A. The hospital bill had been paid.

Q. By whom?

A. By, apparently, the Corbetts. I did not inquire as to who paid it but I believe that the Corbetts paid the hospital bill. I believe it was paid in installments, as I remember.

Q. It wasn't the United States Indian Service that paid it? A. Please?

Q. Didn't the United States Indian Service pay it? A. I can't tell you if they did.

Q. Do you know Dr. Poley? A. Yes.

Q. Was he your associate in this?

A. Doctor Poley was a member of the clinic.

Q. He was the doctor who first took care of this girl?

(Testimony of Paul Vogt.)

A. No, he wasn't. I believe Dr. Smith, a member of the clinic was the doctor who did the surgery on the initial operation. [126]

Q. And Dr. Poley had nothing to do with it?

A. Yes, Dr. Poley examined her and helped out on the case.

Q. Have you seen her since October 9th?

A. I haven't seen her since she left.

Q. And that was October 9th?

A. No, it probably was later than that.

Q. On October 20th?

A. Yes, I believe it was October 20th.

Q. October 20th, and did you examine her foot when she left? A. Yes.

Q. Hasn't there been a decided improvement since she left?

A. There has been an improvement in the sense that they may be a little less swelling but the scar is still intense and adherent in the region of the skin graft and it was still tight and the loss of motion is still apparent.

Q. Now, this instrument that she has on is the foot-drop and the purpose of that is to try to overcome the foot-drop, to get support for the foot?

A. The purpose of that is to eliminate the danger of the foot dragging and tripping.

Q. And that is only necessary for some little length of time? [127]

A. No, it isn't. It is necessary to wear that permanently or have the correction by another operation which would help the ankle joint or pro-

(Testimony of Paul Vogt.)

vide a permanent block so that it could be supported.

Q. Well, in wearing the brace that aids in weight bearing.

A. Well, wearing a brace isn't for the purpose of weight bearing.

Q. Well, isn't one of the purposes to permit her to put some weight on her foot? A. No.

Q. You advised her to start putting some weight on it?

A. Yes, the reason that she wasn't allowed to bear weight for some time after her injury was this: That she had sufficient soft tissue injury and disturbance of the blood supply so that this foot would tend to swell and in swelling it would become painful and she was gradually allowed to be out of bed and the swelling would be painful for short periods and gradually she was allowed to be out for short periods of time.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.) [128]

TITUS CORBETT

a plaintiff herein, recalled as a witness on his own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. Mr. Corbett, there was some testimony about payment for a foot brace. Who paid for that?

A. I did.

Q. And what did you pay?

A. Fifty dollars.

Q. And, then, you bought some medical supplies outside of these bills that were paid, did you not?

A. Yes, sir.

Q. And how much do you think that that run you?

A. Oh, probably ten dollars.

Q. And who paid this hospital bill that has been paid? A. I did.

Q. Out of what money?

A. My own money.

Q. Was there any Tribal monies or any Indian monies used for this? A. No.

Q. And you intend to pay the doctor bill out of your own monies, do you?

A. Yes, sir. [129]

Mr. Felton: I think that is all.

Mr. Brown: No examination.

(Witness excused.)

Mr. Felton: I want to call Mrs. Frank from the standpoint of one thing I forgot to prove, which was funeral bills.

LOTTIE FRANK

a plaintiff herein, recalled as a witness on her own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. And you are Lottie Frank who was on the stand here before? A. Yes, sir.

Q. I forgot to inquire of you as to funeral bills.

Mr. Brown: Object to any testimony about funeral bills, if the Court please as not within the issues of the case. No allegation in the complaint and no prayer for any funeral bill.

The Court: Let me see the Complaint.

Mr. Felton: There was no special pleading on it, your Honor.

The Court: It is my understanding that under the Rules of Civil Procedure for the United States District Courts [130] the rule is that special damages must be specifically pleaded.

Mrs. Felton: This is special damages and there is no special pleading on it, that is right. All right, you may come down. The plaintiffs rest.

Mr. Brown: If the Court please, at this time, as to both cases, I want to move for dismissal of the plaintiff's complaint. I understand that that doesn't waive the right to proceed. It is the same as the state court. On the grounds that the evidence affirmatively shows contributory negligence on the part of the plaintiffs and it doesn't affirma-

tively show any negligence on the part of the defendant. And in addition to that, I want to show that the evidence brought by——

Mr. Felton: I can't hear counsel.

Mr. Brown: Dismissal of the suit brought by Mrs. Frank in her representative capacity on the grounds that the complaint does not state a cause of action, in that no dependency is pleaded and the proof went in over objection. Now, I want to direct myself to the last one first, your Honor. This is necessarily brought under our death claim statute and it provides that when death of person is caused by a wrongful act, neglect or default of another——

(Whereupon, argument of counsel was had upon motion for dismissal.) [132]

The Court: The motion will be denied. You may proceed.

Mr. Brown: Your Honor, I think that the answer fully explains our case. There is no necessity of my making a statement.

The Court: I think so. If you wish to make a statement, you may. I will not ask you to do so.

Mr. Brown: I will not. I will call Mr. Hyland.

GORDON E. HYLAND,

called as a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Hyland, did you in the presence of Mr. Titus Corbett or at any time there instruct the

(Testimony of Gordon E. Hyland.)

ambulance driver that night to take Titus Corbett to jail and lock him up until you got there?

A. I did not.

Q. Did you and the sheriff have any conversation with any of these people relative to what they had done that evening? A. Yes.

Q. You were stationed at Goldendale, were you not? A. Right. [132]

Q. And what time did that carnival close that evening? A. About twelve-thirty.

Q. Now, which one of the witnesses, if you can recall, did you talk to about what they had been doing?

A. I talked to two. This man over here. I can't recall his name.

Q. Mr. Whitaker?

A. Yes, Mr. Witaker. And I talked to Rachael Wilson.

Q. Yes. Titus Corbett, did you talk to him?

A. No.

Q. Was he present when you talked to the others?

A. He might have been present when I first talked to Miss Wilson.

Q. What was said about drinking, if anything?

A. I questioned as to when they had had anything to drink.

Q. And what did they tell you?

A. That they had had nothing to drink from the time that they had left Celilo.

Q. Ten o'clock that evening?

(Testimony of Gordon E. Hyland.)

A. Whatever that time was.

Q. Now, one other question. So far as you know, the car that was occupied by the plaintiffs may have been moved after the accident, up to the point that it was occupying when you got there?

A. That is right.

Mr. Brown: That is all.

Cross Examination

By Mr. Felton:

Q. Mr. Hyland, you had some conversation that Mr. Corbett might have heard that you wanted to question Mr. Corbett some more, didn't you?

A. I believe that the statement that I made to the ambulance driver was that I requested that Mr. Corbett go with his own wife in the ambulance to The Dalles. In other words, that the ambulance driver needed somebody to ride in the ambulance with Mrs. Corbett and I chose Mr. Corbett because it was his own wife; and I instructed the ambulance driver to kindly keep an eye on Mr. Corbett and see that he didn't leave the hospital because I wanted to see him later.

Q. Now, you mentioned the fact that you questioned as to drinking? A. Yes, sir.

Q. As to the various people in the car?

A. Yes.

Q. In your opinion, did liquor have anything to do with this accident on either side?

Mr. Brown: I think that is a conclusion of

(Testimony of Gordon E. Hyland.)

the witness, calling for a conclusion of the witness and I will object to it. [134]

The Court: I will sustain the objection.

Mr. Felton: Q. All right, did you find any evidence of drinking on the part of Martha Corbett?

A. Wait a minute until I get these people sorted out.

Q. She was the girl that was in the ambulance.

A. I made no attempt to discover whether she had been drinking.

Q. So far as you know, there was nothing to show that she had been drinking?

A. I never got close enough to her.

The Court: Who was it you were referring to?

Mr. Felton: Martha Corbett.

The Witness: At the time I arrived at the scene of the accident she was on the side by the side of the ambulance.

Mr. Felton: Q. You had no way of determining? A. No.

Q. How about the deceased man; did you get close to him? A. Yes.

Q. Did you find any evidence of drinking?

A. No.

Q. That takes care of the two injuries.

A. Yes.

Q. And I believe you smelled some faint odor of liquor confined to Mr. Whitaker and Rachael Wilson? [135]

(Testimony of Gordon E. Hyland.)

A. And Titus Corbett.

Q. And that was all? A. Yes.

Q. The two people that were injured here, there was apparently no liquor that you know of as to them that would indicate they had been drinking?

Mr. Brown: If the Court please, I object to this. He has testified that he didn't get close to the girl and the man was dead.

Mr. Felton: Q. Were any of these people noticeably affected by liquor?

A. That would be a hard question to answer, I mean to explain.

Q. They weren't in a drunken stupor, were they?

A. May I explain that. It is hard to answer.

Mr. Brown: I have no objection.

Mr. Felton: Q. All right, let us get this cleared up.

A. The symptoms of shock and drunkenness are so nearly identical that I couldn't attempt to determine whether it was drunkenness or shock, unless I had other evidence to sustain that.

Q. But you have injury evidence.

A. There was no physical evidence of any liquor at the scene of the accident.

Q. What happened to Titus Corbett's body——

A. To which?

Q. I will cut that question. When did you smell liquor on Titus Corbett?

A. At the hospital at The Dalles.

(Testimony of Gordon E. Hyland.)

Q. That is after the accident, how long after that?

A. Oh, probably three quarters of an hour or one hour after I arrived at the scene of the accident.

Q. At the scene of the accident you smelled no liquor on him?

A. I didn't get that close to him at the scene of the accident.

Q. Then, you don't know whether he had any liquor at all at the scene of the accident, is that the way you are placed? A. That is true.

Mr. Felton: That is all.

Mr. Brown: That is all. Now, so far as I am concerned, your Honor, this witness can be excused from further attendance on the Court. They need him on the highway.

The Court: He may be excused if Mr. Felton has no objection.

Mr. Felton: I think we will keep him around this afternoon and we will know better later whether we will need him. [137]

ROBERT W. MERRILL

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Merrill, by whom were you employed on September 9th, 1945?

A. I was in the Army at the time, in the Air Corps.

Q. And where was your base station?

A. Ephrata, Washington, Ephrata Army Air Base.

Q. How long had you been in the Army?

A. I had been in four years and one month.

Q. And what had been your service in the Army?

A. I had been in service thirty-four months in the Aleutian Islands in the Air Corps.

Q. In what capacity in the Air Corps?

A. I was Navigator on a B-17 Bomber and on other heavy bombers.

Q. Why did you leave the Air Corps?

Mr. Fenton: Objected to, if the Court please, as immaterial.

Mr. Brown: It is very material. I can't put on his testimony without showing his background. I want to show that he was grounded and made a military policeman and had had lots of experience, and—— [138]

The Court: He may proceed; it is preliminary.

(Testimony of Robert W. Merrill.)

Mr. Brown: Q. Why did you leave the Air Corps and go into the ground forces?

A. We were over at Kiska and the flack came through the ship and I was injured in my head and back and my eye and I was knocked out and I lay flat in the hospital three months up there and we evacuated to Fort George Wright Hospital and I stayed four months in the hospital.

Q. And when you were restored to duty, what work did you do?

A. Military police, road patrol.

Q. And how long were you in the military police? A. Just a little over a year.

Q. Now, coming down to the early morning of September 9th, were you on the highway that night beyond Goldendale? A. Yes, sir, I was.

Q. With whom?

A. I was with my buddy, Richard K. Swank.

Q. Were you driving? A. No.

Q. Swank was driving? A. Yes, sir.

Q. There were the two of you in the automobile? A. Yes, sir.

Q. Now, after you get below Goldendale and approached [139] the scene of this accident, tell the Court what happened; use your own words and tell what happened until you are stopped.

A. Well, sir, we had just left the carnival there at Goldendale just a little while before and we were shooting the breeze driving a long there and went around this wide turn and we were looking up the road and talking, and all of a sudden we seen

(Testimony of Robert W. Merrill.)

this flashlight waving in the middle of the road, and so we started to slow down, and as we got a little closer we saw a woman lying in the roadway and thought we had better stop. And I told Swank we had better stop because I thought there had been an accident occurred, and so we pulled off to the side and off the edge as far as we could because it wasn't very far you could pull out, and asked what the trouble was and if we could help them one way or another, and "No, no, we are going up the road."

Q. Who said that?

A. This lady in the blue suit back there.

Q. Who was that?

A. This lady in the blue suit (indicating in courtroom).

Q. This lady right here?

A. No, over there in the first row in the blue suit.

Q. Miss Wilson, who testified here?

A. Yes, sir, she was on the stand. I don't know her name.

The Court: You may stand up, Miss Wilson.

Mr. Brown: Q. Is that the lady you mean?

A. Yes, sir.

The Court: Thank you.

Mr. Brown: Q. You and your buddy were in uniform?

A. Yes, at that time were in uniform there.

Q. And could you identify the woman who was down in the middle of the road?

A. Yes, sir.

(Testimony of Robert W. Merrill.)

Q. Who was that?

A. That is Mrs. Corbett.

Q. Go ahead.

A. So—Is it all right?

Q. Yes, go right ahead and tell what happened.

A. And so I got out of the car then and Swank turned around and told me, "You better get out of the road." And I went behind the car and said, "Are you having any trouble?" And she said, "No, no, going up the road."

Mr. Felton: We ask that this conversation be limited to any time that the plaintiffs or the deceased were present.

Mr. Brown: Q. During all this conversation Mrs. Corbett was present, was she?

A. Yes, sir.

Q. Was there a man with them?

A. Yes, sir, there was one man and two other women besides Mrs. Corbett. [141]

Q. What was the man doing?

A. Well, when we first got there this woman was lying on her back and screaming and kicking her legs and waving her arms and Swank and I asked this woman what was the matter, what was the trouble, and she said, "Oh, nothing, nothing." And I said, "You better get off of the road because you will be killed." And they said, "Okeh, okeh, we will get off the road." And this man was trying to reach down and pick up this woman and every time he would reach over and pick her up a little ways she would pull her arm away and get down and he couldn't get her straight up.

(Testimony of Robert W. Merrill.)

Q. Now, what was the condition of the man who was lifting the woman and the woman on the road as to sobriety?

A. Well, I would say that they definitely had plenty to drink?

Q. Were they drunk?

A. Yes, sir, I would say so.

Q. Go ahead and tell what happened; did you leave them in the road?

A. Well, sir, this fellow finally got the girl up and had her placed so her arms were like this and he was holding her up. Your Honor, may I use that?

The Court: You may refer to the position on the drawing to illustrate your testimony.

A. (Going down to blackboard): Well, they were standing [142] right in here when they got up finally.

Mr. Brown: Q. That is indicating about the center of the road?

A. Yes, that is right, and they were facing the road like that. Well, our car was parked right in here and I told Swank, I said——

Q. You can't say what you told Swank unless they heard you.

A. Well, we got back in the car. The moment we did that there was a car approaching from our rear and that was about a quarter of a mile from there when we saw it, and so we got in the car and started off because they got up and we thought they would go home, and so we started up.

(Testimony of Robert W. Merrill.)

Q. Started west?

A. Yes, sir, that is right, sir. And we saw these headlights coming our way.

Q. You saw a car approaching from the west going east?

A. Yes, just the opposite direction and we pulled up about twenty feet and I looked, was looking back to see if they had moved and I told my buddy, "You better stop."

Mr. Felton: You can't say what you told your buddy.

A. Well, I told him "stop" because they would be hit and we were moving about three or four miles an hour.

Mr. Brown: Q. Did you see the accident, the actual striking? [143]

A. Yes, I did.

Q. How did you happen to see it?

A. Well, I had a quartering view of it where I wasn't looking into any lights.

Q. How many people at that time were in the center of the road or in the roadway?

A. Well, right near the center of the road two or three feet from the white line this man was holding Mrs. Corbett, as I said; and, then, just a little further off to the edge of the road—now, wait a minute, I am getting ahead of myself—well, then this girl that had her hand out, she was standing there helping trying to get this fellow to get her out of I there, I think, and then another girl was two or

(Testimony of Robert W. Merrill.)

three feet from there and she was going over to the edge of the highway.

Q. Then, what happened; did you see the car strike them, just tell the Court what happened?

A. Well, sir, when this car hit this girl she had her leg out like this, Mrs. Corbett, and this guy was still holding her and he was trying to drag her and the car hit the two of them, and this fellow he seemed to go behind the car like that and shoot right out and I didn't see him after that, and this girl also went on in there.

The Court: It isn't clear to the Court where his position was at the time, Mr. Brown. [144]

Mr. Brown: Q. Could you indicate on there just where it was?

A. Well, at the time these two people——

Q. No, where you were?

A. Well, we had pulled in here just enough so we could see right across and I was looking back and the other car was showing up here pretty fast. Well, before it stopped Mr. Wilkerson's car moved on down past here and I saw this girl coming around this right side of there and she was spinning, oh, I imagine, two turns around before she got straightened around.

Q. Which girl was that?

A. I think that that was the one with the hand cut. I don't know just what her name is.

Q. All right, go ahead.

A. And I jumped out of the car and ran back to the accident and I went over to the ditch and

(Testimony of Robert W. Merrill.)

this guy was lying on the one side of the ditch and this girl was lying just to the side of him like this, and Swank and I got down in there and I put my hand on his chest and I got up and I told Swank that I thought he was gone, and I told this car—first, I went to the girl and her pulse was beating and I told Swank, "I think she is going to get through." And I told the car that just stopped there, I said, "Get to the nearest place and call an ambulance." [145]

Q. And that car that followed you called an ambulance? A. That is right.

Q. And you don't know who that person was, or haven't seen him since?

A. That is right. So, after that happened these other two girls were around there and one of them was crying and I didn't do anything. I was pretty scared there too and I told Swank, I said, "Let us go and get the car and move it off of the road." Because there was quite a few cars coming and as we went to move the car off the road there was another car parked right in front of us, a convertible coupe right directly in front of our lane and it was partly on the gravel driveway and we had just room to squeeze in front and in there and I got out of the car and I walked up to the Corbett car and I opened the door and shook the man in there and——

Q. Who was in the car?

A. Mr. Corbett, and I opened the door and shook him.

(Testimony of Robert W. Merrill.)

Q. What was his position in the car? What happened?

A. When I opened the door he was lying back and I shook him and I said, "You better move this car off the road, there has been an accident down there." And so he didn't do anything and I walked down to the accident and he just looked at his watch and didn't do anything, and then I was staying down there and talking to Wilkerson and Wilkerson asked me for my name, and this Indian woman told me to keep my mouth shut and [146] I didn't think she should interfere.

Q. Who was that?

A. That is Miss Wilson and at first I didn't tell my name and then I told Wilkerson my name and he was shaking as bad as I was and he got my name written out finally, and somebody said that the highway patrol was coming and so we pulled out, and it was about twenty minutes to three.

Q. Did you see Mr. Whitaker get out there at all?

A. No, sir, I didn't see Mr. Whitaker around the accident at all.

Q. Then, from the time you first came up there until after the accident, this Indian car wasn't moved until after the accident, is that right?

A. That is correct. It was still in that position as we pulled out around twenty minutes later, and the last thing I said, I got around and hollered

(Testimony of Robert W. Merrill.)

out of the window and I said, "You better get that car out of the highway." And then we left.

Q. Now, you were overseas and there was some trouble with Miss Wilson about giving your name——

The Court: I didn't hear that question.

Mr. Brown: (Q.) There was some trouble with Miss Wilson about giving your name. You were in the service and his Honor was also in the service. Tell the Court why you didn't give your name. [147]

A. Well, "VJ" day had come and we were restricted and didn't get any passes as we were restricted and Swank and I were in the service a long time and we had our points to get out and get discharged and we wanted to get away and we said, "To the heck with them and we will flip a coin and see which way we will go." And that is the reason I didn't want to give my name to Mr. Wilkerson at first.

Q. Now, did you know any of the parties at all prior to the accident? A. No.

Q. Have you any interest whatsoever in the outcome of this trial?

A. No, sir, all I want to do is go back to work.

Q. And you are here on subpoena?

A. Yes.

Mr. Brown: That is all. Q. Oh, did you see any article of apparel picked up that night and put in the ditch, a shoe of something?

A. No, sir, I didn't.

Q. This Wilkerson car, as it approached you,

(Testimony of Robert W. Merrill.)

was there any indication that it was going at an excessive rate of speed?

A. No, sir, I would say around forty miles an hour.

Q. As you noticed the Wilkerson car, did it change its course at all?

A. Yes, sir, it made a change; it definitely did. The [148] officer has drawn it here—only my estimate—I didn't measure it or anything, I just looked at the skidmarks afterwards and I only estimated thirty to thirty-five feet of skid on it, but before he had any contact at all with these people his front wheels were at least one foot across that white line and he was going across the road.

Q. That white line you are referring to is the center line? A. The center line.

Q. The center line of the highway?

A. That is right.

Q. How far to their right of the center line would you say these two people were when they were struck?

A. I would say close to two and a half feet.

The Court: I don't believe that is very clear, Mr. Brown, what their right was. Do you mean the pedestrians' right.

Mr. Brown: Yes, I will straighten that out. (Q.) How far to the south of the center line of the road were they?

A. Two and a half feet, around two and a half feet.

Mr. Brown: You may examine.

(Testimony of Robert W. Merrill.)

Cross Examination

By Mr. Felton:

Q. Now, Mr. Merrill, it is your testimony that they started skidding before they hit these people, is that it? [149] A. No, it isn't.

Q. Well, your testimony is that they were hit near the center line and you testified once that it was white and once that it was black. Which is it; white or black?

A. The center line was white.

Q. It wasn't black then. And your testimony is that they were hit near the center line. Will you mark on this chart up here that we have where the actual striking took place.

A. I would say right around in here.

The Court: May I suggest that it would make a better record if the corresponding mark be put on the exhibit, so there would be a record of it for the appellate court.

Mr. Felton: May the Clerk make that mark?

The Court: Is that agreeable with you, Mr. Brown?

Mr. Brown: Yes.

The Court: That is so we will have the same mark on the exhibit.

Mr. Felton: (Q.) Will you put your initial "M" where it was. A. Yes.

Q. Are you accepting the testimony of the state patrolman as to skidmarks now?

A. No, sir, I am not.

Q. Now, let us see if we could turn this thing

(Testimony of Robert W. Merrill.)

around [150] and examine it. Now, the position of the bodies is here, you understand?

A. This is the bodies.

Q. The position of the bodies are here.

A. I did not understand that. I understand that it wasn't there.

Q. Now, where did you understand the position of the bodies was?

A. I understand——

Mr. Brown: Well, it isn't a question of where he understands they were; let him draw it on there.

Mr. Felton: Let me conduct my own cross examination.

The Court: The objection overruled. He can testify with reference to this chart, where he saw the injured persons.

Mr. Felton: (Q.) Now, this point is 272 feet from the cross over, that is, from where the safety lines on the other side are. This point is 272 feet according to this chart. Now, where in your opinion were the skidmarks?

A. Well, sir, if the bodies are right here, is that correct?

Q. I am asking you where they are.

A. Well, I didn't go out there and measure it, sir.

Q. Now, you heard the state patrolman testify, didn't you? [151]

Mr. Brown: Now, if the Court please, I object to that. He saw the accident and counsel can't tie him down here.

(Testimony of Robert W. Merrill.)

The Court: What was the last question?

(Last question read)

The Court: He may answer the last question. The objectoin overruled.

Mr. Felton: The state patrolman placed the marks here, you heard that.

Mr. Brown: Well, your Honor, he could have heard the testimony and not seen where he placed the marks.

Mr. Felton: (Q.) Did you hear the testimony this morning? A. Yes, sir.

Q. You were in the courtroom when the trial started? Yes, sir.

Q. What education have you got?

The Court: I didn't hear that.

Mr. Felton: (Q.) What education have you had? A. One year of college.

Q. In what course? A. Journalism.

Q. Journalism? A. Yes.

Q. Now, the testimony, as I understand it, the state [152] patrolman testified that the bodies were 272 feet from the point of vision of the cross over. Do you know what the point of vision is?

A. Yes.

Q. It is where the white line and yellow line are for passing? A. Yes.

Q. Now establishing this point as the point where the bodies were do you accept that as a proper point for the bodies or do you place them some place else?

A If this is where the state patrolman said that

(Testimony of Robert W. Merrill.)

the bodies were lying and he has that point measured, I agree with him but the skidmarks would be further up here because the point of impact is somewhere right in here.

Q. Now put an "M" there, will you? Now, how near the edge of the road do you put the skidmarks?

A. Well, sir, they started out back in here some place.

Q. I mean, how close to the edge of the road were the skidmarks?

A. I didn't measure it. I did make a rough guess.

Q. Now, you understand that the direction of the death car is down, do you? A. Yes, sir.

Mr. Brown: Now, I didn't get that question.

The Court: Repeat the question. [153]

Mr. Felton: (Q.) You understand that the direction of the death car is down?

A. Yes.

Q. You understand that the place of the bodies is where the officer placed them?

A. Yes, sir.

Q. Did you place the position of the bodies at "M"? A. Yes, sir.

Q. Make a little nob at "M." And you place the skidmarks along the highway, do you?

A. I show them back that way. I mean I did not measure them.

Q. How close to the white line did you say the skidmarks were?

A. I didn't measure that, I won't make a guess.

(Testimony of Robert W. Merrill.)

Q. How close to the shoulder would you say that they would be?

A. I wouldn't make a guess.

Q. Then, what you testified to is a guess?

A. No, sir, I know where these people were, I saw them right there.

Q. Now, that is approximately on that scale, that is approximately twenty-five feet, I should say east of the point where the bodies were?

A. No, sir,—— [154]

Mr. Brown: Now, if the Court please, I want to object to that because the highway patrolman who drew that said it wasn't according to scale.

Mr. Felton: Yes, I know.

Mr. Brown: We can see ourselves that it shows 272 feet here as against 19 feet of pavement in this proportion.

The Court: I think that this objection will be sustained, referring to this diagram as a scale diagram because obviously it is not drawn to scale.

Mr. Felton: All right, we will not use it as a scale digram. (Q.) Now, you have placed the position of the bodies as being west of the point of impact?

A. No, sir, it should be east.

Q. Could you place it where it should be?

A. Sir, I have got one eye and I have got to see out of it.

Q. You can't see very well, then.

Mr. Brown: I think that is improper.

The Court: You may proceed.

(Testimony of Robert W. Merrill.)

Mr. Felton: Could you place it. Rub it off there and place it again. (Q.) Now, that is approximately even with the location of the bodies on the side of the road, is it not?

A. That is right, sir.

Mr. Felton: Sit down. (witness returns to stand.) (Q.) Now, which side of the car struck the bodies? [155]

A. The right side of the car, the front part.

Q. Then, you say that the patrolman was wrong on his skidmarks?

A. No, I didn't say. I said that I made my estimate. I didn't measure them.

Q. But you said that the position of the impact was nearer the white line than it was to the shoulder? A. Yes, sir, I say that.

Q. And on the right side of the car?

A. Yes, sir.

Q. And at a position directly north of the bodies?

A. I would not swear to directly north. In that location.

Q. Well, what will you swear to, then; tell us the fact.

A. Due to the position of the Wilkerson car moving on forward, I couldn't say just how square they went across the road because my point of visibility was blocked from there where they were.

Q. Now, will you make a few marks "X" right there as to the location of the various people at the point of impact.

(Testimony of Robert W. Merrill.)

A. Where the two people were laying?

Q. Not the two people, where all the people were at the point of the accident.

Mr. Brown: Just a minute, if your Honor please, I can't understand what he wants. There were four people there. [156] What people do you want?

Mr. Felton: All four people.

The Court: I am not clear on the people you are referring to. Do you mean the people that were on the highway just before the accident?

Mr. Felton: Yes, just before the accident. I want the position of the four people.

The Witness: Well, sir, we were facing the north and this man was holding the woman, and they were about like this (illustrating), and this woman, Mrs.—Miss Wilson that got her hand hurt or cut, would be standing right about in here and this other woman was off in here someplace.

Mr. Felton: (Q.) Clear away from the car?

A. Yes, sir.

Q. The car never came near Jane White—Jane White is the elder of the two girls sitting back there.

A. Yes, sir, I say that.

Q. Now, the "X's" place your best story as to where they were? A. Yes, sir.

Q. Where was your car sitting right at the time? A. Right in here, sir.

Mr. Felton: You better mark another "M" in here. Sit down. (witness returns to stand).

(Testimony of Robert W. Merrill.)

Q. You stayed there for a little while and you came down? [157] A. Yes, sir.

Mr. Felton: How long do you wish to continue this afternoon.

The Court: I beg your pardon?

Mr. Felton: How long is it your desire to continue this afternoon, your Honor?

The Court: We will proceed until four-thirty.

Mr. Felton: (Q.) Now, Mr. Merrill, how old are you? A. Twenty-two.

Q. Where do you live?

A. Los Angeles, California.

Q. What is your present occupation?

A. I am in the Sales Department of the Fibreboard Products Company.

Q. And you gave your name and address to Mr. Wilkerson that night, did you not; or did you refuse to?

A. I gave it to him, yes.

Q. Where is your buddy Mr. Swank, whatever his name is; is he here?

A. No, sir.

Q. Where is he?

A. I don't know, sir; he was discharged.

Q. How did you happen to come up here to this trial?

Mr. Brown: If your Honor please, that is objected to.

Mr. Felton: To show interest, your Honor. [158]

The Court: The objection overruled.

(Testimony of Robert W. Merrill.)

Mr. Felton: (Q.) How did you happen to come up here to this trial?

A. The—I can't remember his name—the attorney sent for me.

Q. Which attorney? A. Mr. Senn.

Q. How did he contact you?

A. By wire.

Mr. Brown: If the Court please, again, it is wholly immaterial. There is no suggestion here of what he is trying to get at but I think it is improper.

The Court: He can show how he came here, as bearing on interest.

Mr. Brown: As to who brought him here?

The Court: You went into that, Mr. Brown. You may proceed.

Mr. Felton: (Q.) And had he contacted you before?

A. No, sir—You mean before I came up here; no, sir?

Q. How much are you being paid to come here?

A. Well, I haven't been paid anything.

Q. Are you coming up here on your own money?

A. No, sir, the Company paid my expenses here.

Q. What company?

A. Aetna Casualty Insurance. [159]

Q. How much did they send you?

A. They didn't send me anything, sir.

Mr. Brown: Now, if the Court please, that is improper.

(Testimony of Robert W. Merrill.)

The Court: The answer with reference to insurance companies will be stricken.

Mr. Brown: That is what he is trying to bring in here.

Mr. Felton: I simply asked for the amount of money and he threw in this thing.

The Court: Yes, I understand.

Mr. Felton: I don't think we will get it out now, and——

Mr. Brown: I object to the statements that this boy has been paid to come here.

The Court: If counsel will talk one at a time.

Mr. Brown: I object to the statement that he won't get it out of this boy. This witness is entitled to protection. He is a wounded veteran here. He is fixing a money price on his coming here and it is wholly improper.

Mr. Felton: I submit, your Honor, that I have conducted myself as a gentleman and a member of the bar, and I assure you I will continue to do so.

The Court: You may proceed.

Mr. Felton: How much have you received so far on this? A. My expense money.

Q. How much?

A. $53.88 for expenses. [160]

Q. How much are you going to receive on this contract?

Mr. Brown: If the Court please, I object to that, there is no contract.

(Testimony of Robert W. Merrill.)

The Court: The reference to the contract will be stricken.

Mr. Felton: How much more do you expect to receive out of this trip?

A. I expect to receive wages for what wages I have lost and my expenses home.

Q. And how much is that to be?

A. I don't know how much that will be because I don't know how long I will be here.

Q. How long have you been here?

A. Saturday—I arrived in Yakima yesterday.

Q. Oh, you came to Portland on Saturday?

A. That is right, sir.

Q. And you say you gave your name to Wilkerson? A. That is right, sir.

Q. And were you at the scene of the accident until the state patrolman came up?

A. No, I wasn't, sir.

Q. Now, Wilkerson had your name from that night on, didn't he? A. I don't know, sir.

Q. Did you later write Wilkerson after you went out [161] of the service? A. No, sir.

Q. How did these people contact you?

A. Through an adjuster in the company.

Q. Through what?

A. Through an adjustor.

Q. They looked up your Army record and where you got out. What address did you give Wilkerson?

A. Well, I gave him my Army address. When you are discharged the Army will forward all mail.

(Testimony of Robert W. Merrill.)

Q. I mean, was there any mail forwarded, is what I am asking you? A. No, sir.

Q. Then you were a military policeman for a year? A. Yes, sir.

Q. Are you familiar with the rules of the courts that when you reside beyond one hundred miles you can refuse to attend upon subpoena?

Mr. Brown: Now, if the Court please, I object to that. What difference does it make. He doesn't have to come, that is true. I don't know of any such rules as far as the Federal Court is concerned.

The Court: The objection is overruled. He is asking if he knows.

Mr. Brown: What if he doesn't. [162]

The Witness: No, sir, I have never been in court before.

Mr. Felton: Q. You have never been in court before at all?

A. Not in the Federal Court, no, sir.

Q. Now, you are satisfied that Levi Frank, the dead man, was very, very intoxicated at the time you saw him just before the accident?

A. I don't say as to how intoxicated he was, they were, I would say very much so.

Q. Well, the smell of liquor was very noticeable on him?

A. I was never close to Levi Frank except to feel his heart after the accident.

Q. Well, could you smell liquor on him?

A. No, sir, I didn't smell liquor on Levi Frank. I didn't say that.

(Testimony of Robert W. Merrill.)

Q. Then, you don't know whether Levi Frank was drunk or not?

A. His actions is the only thing I could go on.

Q. Well, you testified that he acted like he was drunk. Now, what actions committed you to this finding?

A. Well, when he grabbed this girl and she pulled him down and he got her up a little ways and she was down and he finally got her up. [163]

Q. Now, who else are you satisfied were intoxicated there?

A. Both of the other women besides Mrs. Corbett.

Q. Now, to what extent did that intoxication go?

A. Well, apparently so much so that they don't remember anything.

Q. Well, now, you may answer my question, Mr. Witness, and tell me about the intoxication there.

A. They thought we were police to begin with.

Mr. Felton: I don't want to know what you think they thought. Just answer the question.

The Court: Just a moment, just answer the question that counsel asks you.

Mr. Brown: Well, your Honor, I insist that that is answering his question. He said: What other evidence of intoxication, and the witness said that they thought they were policemen.

The Court: That isn't responsive, Mr. Brown.

Mr. Felton: Q. Well, give their physical—not mental—their physical aspects of intoxication.

A. Well, stumbling around the road up there.

(Testimony of Robert W. Merrill.)

Q. Did you smell liquor?

A. Yes, I did on the two women.

Q. Very strongly? A. Yes. [164]

Q. It was quite pronounced? A. Yes, sir.

Q. It was unmistakable?

A. Yes, sir, on the girls.

Q. And it was unmistakable on Levi Frank, also?

A. Well, sir, as I have stated, I did not get up close enough to him to smell that.

Q. They were together?

A. I understand that, sir, but these two girls tried to get us to go because they thought we were police.

Q. And you were military police, weren't you?

A. Yes, sir.

Q. You said that at that time you were A.W.O.L.? A. Yes, sir.

Q. And you were on a party?

A. I didn't say anything about a party, no, sir.

Q. Well, you were going out from the base. I am not talking about liquor. I am talking about a party. You were on French leave. You were going out to have some fun? A. Certainly.

Q. You didn't go out to play marbles; you wanted to have some fun?

A. I might have—we wanted to have some fun.

Q. You wanted to do such things as soldeirs usually do when they went out like that? [165]

Mr. Brown: Objected to, if the Court please, as to what soldiers usually do.

The Witness: No, sir.

(Testimony of Robert W. Merrill.)

Mr. Felton: I spent enough time in the Navy to know about that.

The Court: You may answer.

The Witness: Well, during the time we were gone we didn't do anything more than when we were not A.W.O.L.

Q. Did you have a drink that day?

A. Yes, sir, I did.

Q. And how long before the accident was the last drink you had?

A. At Ephrata, Washington.

Q. Did you have any liquor in the car?

A. Yes, sir.

Q. What liquor did you have in the car?

A. What did we have in the car?

Q. What liquor?

A. We had some in the suitcase.

Q. And you had been drinking constantly for how many days?

A. No, sir, we had not been; I had been on twenty-four hour shift and came off just that day.

Q. How many hours; how long had you been off?

A. When we were down there I went off at noon time. [166]

Q. This was midnight? A. Yes, sir.

Q. And how many drinks did you have at Ephrata? A. Two or three drinks.

Q. And were there any other liquors, wine, beer, or anything of that nature that you drank between Ephrata and the scene of the accident?

A. We didn't have anything to drink and we

(Testimony of Robert W. Merrill.)

were saving it for later. At that time liquor was rationed.

Q. What was your conveyance?

A. A Ford automobile, a convertible sedan.

Q. Whose automobile?

A. What was your question?

Q. Whose automobile?

Mr. Brown: Objected to, if the Court please, what difference does it make.

The Court: I think that is going far afield. The objection will be sustained.

Mr. Felton: The other fellow was driving, wasn't he?

A. That is right.

Q. There was a thirty-five miles an hour speed limit at that time, was there?

Mr. Brown: Objected to, if the Court please.

Mr. Felton: Q. Do you know if there was or not? A. Yes, sir, there was. [167]

Q. And this car that was coming over the hill was traveling above that rate of speed, this car of Wilkerson's? A. I wouldn't know.

Mr. Brown: If the Court please, I want to object to that. I think that in the first place while I am a lawyer and supposed to know what the law is I have very distinct recollection that the attempt to regulate speed limits went off prior to that time, and I want to object to the question asking in regard to the legal speed limit under these circumstances, which even a lawyer if we put him on the stand could not answer.

(Testimony of Robert W. Merrill.)

The Court: I think I will sustain the objection as to the legal speed limit. If he attempts to testify to the speed of the car, that will be proper.

Mr. Felton: Q. Now, you have only one eye?

A. Yes.

Q. Which eye? A. My left eye.

Q. And your left eye is your good eye?

A. Yes, sir, that is right.

Q. And you were sitting to the right of your buddy in the car? A. That is right.

Q. And then you came along and admonished these people on the road and then you drove along and you admonished these [168] other people and then you went on your way?

A. How is that? Would you repeat that?

Q. You went along there and went up and admonished these first people on the road what to do and you admonished these other people what to do and you went on your way, didn't you?

A. No, I didn't.

Q. Well, you testified you went down the road?

A. Well, we told them that they had better get off of the road or they would be killed and then we went down the road.

Q. And then you went down the road to these other people? And then you left there, didn't you?

A. Not until thirty minutes after the accident.

Q. Now, that is the time you admonished these people as to getting off of the road?

A. Which people are you talking about?

(Testimony of Robert W. Merrill.)

Q. These people in the car.

A. It was five or ten minutes after the accident before we went up to the automobile.

Q. Did you walk or ride?

A. We went in the automobile up there.

Q. And you say you went up there five or ten minutes after the accident?

A. I would say that we did, yes. [169]

Q. You drove up? A. Yes.

Q. And you admonished these people to get off of the road and told them what they should do and got in your car and after the accident you got out of your car and then five or ten minutes later you got in your car and drove up to where these people were and admonished them to get off of the road and——

A. I got lost on the way, I didn't follow you.

Mr. Felton: Will you read the question.

(Last question read.)

The Court: I think you better reframe the question.

Mr. Felton: Q. Then, the way this thing happened was this, according to your testimony: You came down the road and you pulled up by these three Indian girls and you talked to them and you told them what they should do, and you stayed around there a little while and then you got in your car and you pulled up to a vantage point about halfway up to the automobile so that you would have a good view of this oncoming accident——

A. No, sir.

(Testimony of Robert W. Merrill.)

Q. Wait a minute, until I get through. And then, when the accident happened that you were waiting for——

Mr. Brown: If the Court please, I am going to object to this question as—— [170]

The Court: Let him finish his question.

Mr. Felton: Are you through?

Mr. Brown: Go ahead.

Mr. Felton: (Continuing): When the accident happened that you were waiting for, you went back and looked over the situation and got her shoe and put it there where she was and you went back to the car and drove up and told the other car where to go and went back to your car and drove off?

Mr. Brown: That is objected to, if the Court please.

The Court: The objection sustained. It is not a proper question; being too long and involved, also.

Mr. Felton: Q. This place of stopping was somewhere east of the scene of the accident, wasn't it?

A. No, sir, it was just about directly north of it.

Q. That was on the other side of the road?

A. Well, we just talked to these people, as I said, and I was out of my car, or out of Swank's car.

Q. Did he get out?

A. No, sir, he wasn't out.

Q. And how long did you stay and talk to them?

A. Just a few minutes.

Q. And you drove up to a point about halfway

(Testimony of Robert W. Merrill.)

between that point and where the other car was parked? A. No, sir.

Q. Where did you drive? [171]

A. We only made it to a point north of the accident about thirty feet, not over thirty-five feet.

Q. And then you stopped again?

A. No, sir.

Q. You were still moving when the accident happened? A. Three or four miles an hour.

Q. You were going just about that speed when the accident happened? A. Yes.

Q. Why were you moving about three or four miles an hour?

A. Because I hollered to him to stop.

Q. What?

A. Because I hollered to him, "Stop."

Q. And you moved about one hundred feet?

A. No.

Q. How far did you move?

A. About twenty-five or thirty feet.

Q. And you were only twenty-five feet west of the accident at the time the accident happened?

A. That is right.

Q. And, then, you stopped?

A. That is right.

Q. And then what happened?

A. We got out and went back to the scene of the accident. [172]

Q. How long did you remain stopped there?

A. Well, as I said, we were just there just a

(Testimony of Robert W. Merrill.)

few minutes before we went over to move our car and went up behind the other car.

Q. And then you moved your car up to where the other car was? A. That is right.

Q. And you parked and told the other fellow to get off of the road?

A. That is where I tried to wake him up.

Q. You got the car off of the road?

A. It never was off of the road while we were there.

Q. Then, where did you park your car?

A. Our car was sitting behind the other car.

Q. Ahead of Mr. Corbett's car or behind him?

A. No, sir, behind it.

Mr. Felton: I don't think there is any possibility of finishing with this witness at adjournment. I am going ahead with this witness for quite a while.

The Court: The Court will adjourn until tomorrow morning at ten o'clock.

Morning Session, May 9, 1946, 10 o'clock a.m.

The Court: Mr. Merrill is still on the witness stand, I believe. [173]

Mr. Felton: Yes, your Honor.

Q. Mr. Merrill, you stated that you were in the Air Corps, did you not? A. That is right.

Q. And you stated that you were a navigator on a B-17? A. That is right.

Q. Now, how long was your training period before you went into a B-17?

(Testimony of Robert W. Merrill.)

A. We got most of our training in Anchorage, Alaska.

Q. Now, from the time you went into the Army how long was it before you went to the Aleutians?

A. Well, I went in August the 13th in 1941, and September 27th we were in Ketchikan, Alaska, in 1941, and then we left there and went to Metlakatla.

The Court: A little louder.

A. We left Metlakatla in April, 1942.

Mr. Felton: Q. How long were you in the Army before you went to the Aleutians, in months?

A. Approximately eleven months.

Q. About eleven months before you went to the Aleutians? A. That is right.

Q. You had, according to your story, a buddy named Richard K. Swank?

A. Richard K. Swank.

Q. Is that his correct name?

A. Yes, that is right. [174]

Q. What was his rating or rank in the service?

A. Staff Sergeant.

Q. Staff Sergeant? A. Yes, that is right.

Q. What is his home town, Topeka, Kansas?

A. Yes, that is right.

Q. Have you got his home address?

A. No.

Q. Where was he last stationed?

A. Ephrata, Washington.

Q. That is where he was discharged from?

A. I don't know where he was discharged.

(Testimony of Robert W. Merrill.)

Q. What I want is specific information so that I can get his address.

A. I have nothing.

Q. Have you corresponded with him since you have been out of the service?

A. No, sir, I haven't.

Q. Then, his last address, so far as you know, was Staff Sergeant Richard K. Swank, Army Air Corps, Ephrata, Washington, is that it?

A. That is right.

Q. And he was attached to what unit there?

A. 430th Base Unit.

Q. 430th what? [175]

A. 430th A.A.F. Base Unit.

Q. Now, he was driving the car on the early morning of the 9th of September, was he?

A. Yes.

Q. What kind of car was that?

A. A '39 Ford Convertible Sedan.

Q. What was his state of registration?

A. He had California plates on it.

Q. And what was his California license number?

A. I don't know his license number.

Q. Was that his car? A. Yes, it was.

Q. Do you know from what time in California that had been licensed?

A. No, sir, I don't know.

Q. Have you any way of giving me any further information to trace the identity and present whereabouts of that car?

A. No, I would have no way of doing that.

(Testimony of Robert W. Merrill.)

Q. You say that we can possibly get in touch with him by writing the Army through this information you have given us?

A. No, I didn't say that.

Q. I say, do you think we can?

A. I don't know. I don't know just how they operate upon things like that.

Q. You said yesterday that the mail is always forwarded? [176]

A. Yes, it should be but his separation base should always have his forwarding addres.

Q. Did you leave him at Ephrata?

A. Yes, that is right.

Q. Do you know what his separation base was?

A. No.

Q. What was your own rank in the service?

A. Well, I had several.

Q. Well, what was your rank at the time you were a navigator in the B-17?

A. Tech Sergeant.

Q. What Tech Sergeant, what rank; there are several Tech Sergeants, aren't there?

A. No, just Technical Sergeant.

Q. Technical Sergeant. How many stripes did you have on your sleeve?

A. Five. I think you are also thinking of Technician. There is the Technician class, but I think it is Technician Five.

Q. Were you a Tech Five, or what were you?

A. I was a Technical Sergeant.

(Testimony of Robert W. Merrill.)

Q. Where did you take your training to be a navigator?

A. At Elmendorf Field, Anchorage, Alaska.

Q. Then, when you were back in the military police, what was your rating or rank? [177]

A. P.F.C.

Q. Now, how did you get from a Tech Five to a P.F.C. A. No, I wasn't a Tech Five.

Mr. Brown: That is a Technician. He was of Sergeant rank. He was Technical Sergeant.

The Court: Technical Sergeant was what he was.

Mr. Felton: I am not familiar with that information. I am trying to get the information so that I can go into this.

Q. How did you get to be a P.F.C. from a Tech Sergeant; how did you get demoted?

A. I arrested a colonel three times at Portland, Oregon.

Q. What?

A. I arrested a colonel three times.

Q. And they broke you for it?

A. That is right.

Q. How many times were you broken from a higher rank to the lower rank while you were in the service? A. Twice.

Q. When did you lose your points and——

Mr. Brown: I think this is wholly immaterial.

The Court: I am going to sustain the objection to that question. I can't see the materiality of it at all.

(Testimony of Robert W. Merrill.)

Mr. Felton: Q. Have you got a copy of your discharge certificate with you? A lot of men carry them in their wallets, that is the small discharge cards. [178]

(Witness hands wallet to counsel.)

Mr. Felton: May I take it a minute, your Honor. Will you take your other material out so I can see the back.

The Witness: There is no other material. There is only one side.

Mr. Felton: Q. This reads that you were discharged as a Private First Class, is that true?

A. Yes, sir, that is right.

Q. Now, in your work as a navigator you were familiar with maps and charts and drawings, were you not? A. How is that?

Q. In your work as a navigator you were familiar with maps and charts and drawings?

A. That particular part of the country, yes.

Q. No, but you learned how to do mapping?

A. Yes.

Q. And your maps were a great deal more involved than this map on the board?

A. Yes, very considerably.

Q. This is a very simple drawing, is it?

A. Yes, sir.

Q. And you have no trouble reading this?

A. Yes, sir, the way that that is drawn I sure do, due to the fact of the skidmarks on the highway.

Q. You know what the patrolman meant by it, do you? [179] A. Sir?

(Testimony of Robert W. Merrill.)

Q. You know what the patrolman meant by it?

A. Well, the way I looked at it, it was different from that, the way it was drawn there.

Q. Well, I know, not the effect, but you know what the meaning of the map is? A. Oh, yes.

Q. When you came upon these people in the highway you had no trouble seeing them, did you, when you first came driving up there?

A. No, they were waving a flashlight in the road.

Q. And they were perfectly apparent to you, were they?

A. When we got up beside them, sure.

Q. Well, you could see them down in the road with your light? A. Not too far.

Q. Well, you could see them far enough to stop?

A. That is right, sure.

Q. And you did see them far enough and you did stop, didn't you? A. That is right.

Q. Now, I believe you stated on direct examination that you got out of the car there, and then you saw a car approaching about a quarter of a mile from the rear and you got back into your car, that is the first time now you got [180] out of your car.

The Court: Is that a question, Mr. Felton, or just a statement?

Mr. Felton: No, that is a question. I meant it for a question.

The Court: Are you asking him whether or not he testified to that?

Mr. Felton: Yes.

(Testimony of Robert W. Merrill.)

Q. You testified to that?

A. Yes, that is when we first talked to them.

Q. And you were on the north side of the road, were you? A. That is correct.

Q. And so you pulled up to a position opposite to these people and stopped? A. Yes, sir.

Q. And you told them that they better get out of the road, and they said, "okeh"?

A. No, they didn't say "okeh."

Q. You are sure that they didn't say "okeh".

A. That is right.

Q. Now, didn't you testify yesterday as follows: "Well, when we first got there this woman was lying on her back and screaming and kicking her legs and waving her arms and Swank and I asked this woman what was the matter, what was the trouble, and she said, 'Oh, nothing, nothing.' And I said, 'You better get off of the road because you will be killed.' [181] And they said, 'Okeh, okeh, we will get off the road'." Didn't you testify to that yesterday? A. Not in those exact words.

Q. You did testify yesterday that way or not?

A. That is right; that isn't the exact language that I remember. I don't remember whether it is or not. I can't swear to the exact words. I can't remember all that but there was similar language to that.

Q. I am asking you what you testified to yesterday.

A. If that is what I said, then that is what I said.

(Testimony of Robert W. Merrill.)

Q. Then, you pulled ahead and—when you were in the car you pulled ahead just enough so that you could see right across to where the accident was, didn't you? A. As I looked back, yes.

Q. You were just a few feet north and west of the point of impact, weren't you?

A. Twenty or thirty feet, between there.

Q. What was the condition of your lights?

A. We had no lights.

Q. On your car? A. That is right.

Q. And that was pointed down the road?

A. That is correct.

Q. And you saw the car coming from down the road? A. That is correct. [182]

Q. And you had warned these other people or didn't; what warning did you give these other people that this other car was there?

Mr. Brown: Objected to as immaterial.

The Court: I will sustain the objection. Are you asking whether he did warn the approaching car that the car was there?

Mr. Felton: That is the Wilkerson car that was approaching over the hill.

The Court: I will sustain the objection. It is not material.

Mr. Felton: Q. This car that was behind you here, that is coming east of you before you started to move at all was about a quarter of a mile back of you, is that right?

A. I would judge similar to that.

(Testimony of Robert W. Merrill.)

Q. It was traveling at an ordinary rate of speed, was it?

A. I don't know just how fast it did go.

Q. From the time you saw it a quarter of a mile back until the time it reached you how long did it take?

A. I don't know. Until I got back to the car.

Q. Then, your actions, from the time you saw it a quarter of a mile back and the time you got back in the car and started up, you had to go back into the car? A. That is right. [183]

Q. All right, tell me what you did from the time you first saw it, tell me what you did, if you can.

A. I ran back and got back in the car just a minute there, and I was still looking back over my shoulder and I could see pretty good due to the fact that there was no top on our car and this other car was approaching from the other direction and I told him to stop and it didn't quite stop.

Q. When did this other car come up is what I want to know, this west-bound car, is what I want to know.

A. This car behind us stopped when the Wilkerson car was slightly across that white line.

Q. Now, you were a navigator and you are used to figures——

Mr. Brown: I can't hear that question.

Mr. Felton: Q. You were a navigator and you are used to figures. The highway speed was approximately forty miles an hour, was it?

A. I said I can't judge it at all.

(Testimony of Robert W. Merrill.)

Q. And thirty miles or forty miles an hour and a quarter of a mile back——

The Court: I didn't get the question.

Mr. Felton: I will withdraw the question so that there is nothing before the Court.

Q. Where you stopped at the time of the accident was on the highway, was it?

A. Well, we were off just a little bit but not much. [184]

Q. There was only a two-foot shoulder on the north side? A. That is right.

Q. But where you stopped was mostly on the highway? A. That is right.

Q. And you only had one eye on the car, is that right? A. Yes.

Mr. Felton: I thought I might be confused. That is all.

Redirect Examination

By Mr. Brown:

Q. Mr. Merrill, referring to this plat, are you conscious of the fact that on this so-called map a distance of 272 feet is represented by the same actual distance on the plat as the width of the highway which is nineteen and a half feet, so that the perspective is entirely off? A. Yes, sir.

Q. Mr. Merrill, in your discussion with Mr. Wilkerson while Miss Wilson was there, did Miss Wilson tell you at that time that she was a school teacher?

Mr. Felton: If the Court please, we object to

(Testimony of Robert W. Merrill.)

that as incompetent, irrelevant and immaterial. It is incompetent because it wasn't in the hearing of either the deceased or of Martha Corbett.

The Court: The objection will be overruled.

Mr. Brown: You may answer.

A. Yes, sir. At that time she stated that she was a school teacher.

Q. And you had left before the highway patrolman had arrived there? A. That is correct.

Mr. Brown: That is all. Oh, just one more question, pardon me. Just one minute.

Q. Did you last evening make an effort again to locate Mr. Swank—is that his name—your buddy?

A. Yes. We were down the street and we saw a car very similar to his, the exact model, but he got away before we could whistle or yell. We thought it might be his car.

Q. Have you any idea where he was or has been since that time?

A. Well, one of our other buddies that is discharged is in Los Angeles and before I came up here I asked if he knew where Swank was.

Q. You don't have to go into the conversation.

A. And he told me that he thought he might be somewhere in Seattle working in the steel plant.

Q. And you have passed that information on here to Mr. Senn the representative of Wilkerson?

A. Yes, I have advised him, and he has talked to me.

Q. And do you know whether they have made an effort to [186] locate him?

(Testimony of Robert W. Merrill.)

A. I so understand.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

W. R. WOODWARD,

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. You were the Sheriff of Klickitat County on September 9, 1945? A. That is right.

Q. And as such you have made an investigation of this accident? A. I was there, yes.

Q. And what time did you get there?

A. I believe around two a.m.

Q. Were you with the state patrol officer?

A. We went down at the same time, yes.

Q. And you were with him?

A. That is right.

Q. And, then, you went on to the hospital, did you, later? A. At The Dalles, yes. [187]

Q. Now, Sheriff, in your capacity as peace officer, have you had occasion from time to time to investigate accidents of this nature? A. Yes.

Q. And either you or your deputy assisted in the measuring of these marks on the highway?

A. Yes, not completely but pretty well.

(Testimony of W. R. Woodward.)

Q. And the purpose of your investigation was to determine what?

A. Well, generally, on an investigation of that type we try to determine if there is any criminal action to be taken, whether we should make an arrest or not.

Q. You haven't any independent recollection of how long these marks were; do you know how long they were? A. The skidmarks of the car?

Q. Yes, the tire marks.

A. No, I am sorry, I lost my notes on that.

Q. The state officer has testified that they were sixty-three feet, that the sixty-three feet of marks were the tire marks or skidmarks. What would that indicate as to the speed of the car?

Mr. Felton: If the Court please, I don't believe that the witness has qualified himself sufficiently to judge the speed. I think that the Court is as fully capable of judging these skidmarks as anybody.

The Court: I will sustain the objection.

Mr. Brown: Q. Did you talk to these Indians that night?

A. Part of them, yes.

Q. Did you talk to Mr. Titus Corbett, the Indian sitting at the table here, whose wife was the injured woman?

A. Just a moment. Yes.

Q. And did you talk to this girl, Miss Wilson? Will you rise. This girl? A. Yes. Yes.

Q. Did you? A. Yes.

(Testimony of W. R. Woodward.)

Q. What, if anything, was said by them relative to drinking, prior to the accident?

Mr. Felton: If the Court please, the conversation I think should be limited to the conversation with one of the parties.

Mr. Brown: Well, with Titus Corbett first, with the man first.

Mr. Felton: And where and when was the conversation.

Mr. Brown: I don't think I have to tie it down.

Mr. Felton: You have got to tie it down to the position in the road.

The Court: I think if you place it at the scene of the accident at the time he was there. [189]

Mr. Brown: All right, at the scene of the accident.

The Witness: Will you ask that question again, please.

Mr. Brown: Q. What, if anything, was said by Titus Corbett at the scene of the accident with reference to drinking, their drinking?

A. I did not talk to him at the scene of the accident.

Q. Did you talk to him later at the hospital?

A. Yes.

Q. What, if anything, was said at The Dalles Hospital? A. Nothing.

Q. Now, as to Miss Wilson, what if anything was said by her?

Mr. Felton: If the Court please, we object to

(Testimony of W. R. Woodward.)
the question as incompetent. It isn't binding upon these plaintiffs.

Mr. Brown: No, but it does go to the testimony of the witness Miss Wilson.

Mr. Felton: The foundation has not been laid. The foundation for any conversation wasn't laid. She wasn't asked for any conversation with any sheriff.

The Court: The objection sustained. I don't recall any foundation being laid as to the witness as to any conversation with the sheriff.

Mr. Brown: Well, then, I will excuse this witness and recall Miss Wilson for cross examination.

Mr. Felton: Well, now, you can't recall Miss Wilson for cross examination.

Mr. Brown: Yes, I can recall her for cross examination.

Mr. Felton: If the Court please, we object to his recalling Miss Wilson for cross examination. If he wants to he can call her as a witness, otherwise.

The Court: I think that the case has been closed and the defendant can't recall her for cross examination now.

Mr. Brown: Apparently, they don't want this in, Sheriff. That is all.

Mr. Felton: If the Court please, we ask that that remark be stricken from the record.

Mr. Brown: That is all. Oh, say, Sheriff, just a minute. Q. Could you tell from their appearance of these Indians whether they had been drinking, their appearance and their actions?

(Testimony of W. R. Woodward.)

Mr. Felton: Now, which Indians?

Mr. Brown: Any of the Indians that you talked to.

Mr. Felton: If the Court please, we object to this question as being too general.

The Court: I will permit him to answer the question, and then he can particularize, if he can, afterward.

The Witness: Well, all I can answer is what I think about it.

The Court: Based upon your observation. [191]

Mr. Brown: Q. Yes, based upon what you saw.

A. Yes, I think part of them had been drinking.

Q. Now, was that true of Titus Corbett?

A. I would say no.

Q. Was that true of Miss Wilson?

A. I would say yes.

Q. And the other girl that was sitting alongside of Miss Wilson?

A. I am sorry I can't place her.

Q. Of course, the plaintiff Mrs. Corbett, was she unconscious?

A. I don't know, I didn't see her.

Q. You didn't see her? A. No.

Q. Did Mr. Corbett explain to you why they were out on the highway? A. No.

Q. And did any of these Indians explain to you why they were out in the highway?

A. Yes, yes.

(Testimony of W. R. Woodward.)

Q. Now, which one explained to you why they were out in the highway?

A. Miss Wilson, as I remember.

Q. What explanation did she give you as to why they were out in the highway? [192]

Mr. Felton: If the Court please, we object to that as hearsay.

The Court: The objection will be sustained. Miss Wilson isn't a party to the action.

Mr. Brown: Pardon me?

The Court: Objection sustained. Miss Wilson isn't a party to the action.

Mr. Brown: I know, but Miss Wilson has testified as to the reason she was out on the highway and I can show that she made a statement directly contrary to that. It will be part of the res gestae. She has made a statement as to the reason she was out on the highway and now if she made a statement contrary to that I think I would be entitled to show it.

Mr. Felton: May I make a statement. I still think that the way to lay the foundation for an impeaching question is to ask the witness directly whether or not she made such a statement at the time and place with such persons present and then the witness in all good faith has a right to affirm or deny or explain the circumstances. This has not been asked of Miss Wilson and the proper foundation for this impeaching question has not been laid. He cannot contradict a person that is not a party as to an immaterial statement.

(Testimony of W. R. Woodward.)

The Court: My ruling will stand. I will sustain the objection.

Mr. Brown: That is all. [193]

Mr. Felton: Now, there is just one question.

Cross Examination

By Mr. Felton:

Q. Did the prosecutor come down to the scene of the accident that night?

A. Not that I know of.

Q. Did the coroner go down to the scene of the accident that night?

Mr. Brown: Objected to as not proper cross examination.

The Court: What was the question: Did the coroner go down to the scene of the accident that night.

Mr. Felton: Yes did the coroner go down to the scene of the accident that night.

The Court: He may answer.

The Witness: Not that I know of.

Mr. Felton: Q. Who gave permission to move the deceased Levi Frank?

A. Well I guess we just kind of took that on our own shoulders.

Q. What?

A. I guess we just took that on our own shoulders.

Mr. Felton: That is all.

(Testimony of W. R. Woodward.)

Redirect Examination

By Mr. Brown:

Q. As a matter of fact who is Z. O. Brooks?

A. He is acting prosecuting attorney for Klickitat County.

Q. And in Klickitat County the prosecuting attorney is also coroner? A. That is correct.

Q. And you made a report to him?

A. A verbal report.

Q. And do you remember the coroner signing the death certificate? A. No, I don't.

Q. You don't remember it? A. No.

Mr. Brown: Will you mark this for identification.

(Whereupon, certificate marked Defendants' Exhibit No. 1 for Identification.)

Miss Bacharach: May I see that.

The Court: He is just identifying it.

Mr. Brown: Q. Referring to this Identification 1, I will ask you what that is.

A. Well, that seems to be a report.

Q. By the coroner?

A. By the coroner.

Q. It isn't an original report?

A. I take it that it isn't. It is marked "copy". No it isn't. [195]

Q. Now, reading that over, I will ask you if that is the report that you made to the coroner?

A. That is substantially the report.

(Testimony of W. R. Woodward.)

Mr. Brown: I am not offering this at this time, your Honor. It is apparently a copy.

Mr. Felton: May I see it so I will know what evidence is going in in this courtroom.

Mr. Brown: I wasn't offering it because I will have to get Mr. Brooks here. That is all.

The Court: Do you have any further questions.

Mr. Felton: No, I have no further questions.

(Witness excused.)

Mr. Brown: I will call Mr. Monahan.

ROBERT MONAHAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Where do you live, Mr. Monahan?

A. Wishram, Washington.

Q. What is your occupation?

A. I am a brakeman on the railroad.

Q. What railroad? A. S. P. & S. [196]

Q. Wishram is a railroad town?

A. Yes, sir.

Q. Were you with the defendants in this case, Mr. and Mrs. Wilkerson on the evening of September 8, 1945? A. Yes, I was.

Q. How long were you with them that evening?

A. Oh, since about—about nine o'clock in the evening, I guess.

(Testimony of Robert Monahan.)

Q. Now, just some time prior to one o'clock were you on the highway with them at the scene of this accident? A. Yes, I was.

Q. How many were in the defendants' car?

A. Six.

Q. And just who were they and how were they seated?

A. Well, there was Mr. Wilkerson, the driver, and his wife sitting in the middle and I was sitting beside his wife.

Q. That is in the front seat?

A. Yes, in the front seat.

Q. Who was in the back seat?

A. My wife——

Mr. Felton: Will you for my benefit speak up a little bit.

A. My wife was sitting on the right hand on the outside and Mrs. Chittester was sitting in the middle and Mr. Chittester was sitting on the other side. [197]

Q. Now, as you approached this point of the accident, what did you first notice on the highway?

A. I noticed a car sitting on the left hand side of the road.

Q. Did you see these people before they were struck? A. Yes, I did.

Q. How long before?

A. Just—just about the time we hit them, I guess.

Q. How many were there at the scene that you saw? A. Three.

(Testimony of Robert Monahan.)

Q. And where were they upon the highway?

A. Well, I would say about three or four feet from the yellow line.

Q. Is the yellow line in the center of the highway? A. Yes, sir.

Q. Just prior to this accident how fast—do you know how fast your car was traveling?

A. No, I can't say for sure, no.

Q. Was it going in excess of fifty miles an hour?

A. No.

Q. Did your car leave the pavement and go upon the shoulder at any time?

A. No, sir.

Q. Just prior to that was the direction of your car turned at any time? [198]

A. It swerved before it hit the people.

Q. I beg your pardon, I didn't get your answer.

A. He swerved before he hit the people.

Q. In what direction, to what direction?

A. (Witness points.)

Q. Well, for the record, which way would that be? You are pointing with your hand.

A. It would be to the north.

Mr. Brown: That is all. You may cross examine.

Cross Examination

By Mr. Felton:

Q. Now, you said that you had been returning from The Dalles, did you? A. Yes, sir.

Q. You six people had been down there on a party?

(Testimony of Robert Monahan.)

A. We had been down to The Dalles, yes, sir.

Q. You had been down there to what?

A. I say we had been down to The Dalles.

Q. On a party?

A. Well, if you want to call it that, yes, sir.

Q. Did you people have anything to drink at The Dalles? A. Yes, we did.

Q. All of you? A. Yes. [199]

Q. Were you in a commercial place or some public tavern of that nature?

A. Yes, we went out to a place to eat dinner.

Q. And you went out to dance afterwards?

A. Yes.

Q. And you were——

A. (Interposing): We were in a place where they eat.

Q. And you had been to a dance too?

A. Yes.

Q. And the six of you went across the ferry and went up the highway? A. Yes, sir.

Q. And who was driving?

A. Mr. Wilkerson.

Q. Now, you say you saw these people before they were hit? A. Yes, I did.

Q. And you are quite certain that they were within, I believe you said, three or four feet of the yellow line in the center of the road?

A. Yes, I am.

Q. Now, you are very sure of that?

A. I am very sure.

Q. What was their position?

(Testimony of Robert Monahan.)

A. They were walking three abreast.

Q. There were four people? [200]

A. No, there was three people that I seen was walking three abreast in the road.

Q. And, then, you didn't see them until you got out of his car? A. After we had hit them.

Q. What kind of lights did you have on this car that you were in?

A. What kind of lights?

Q. Yes, what kind of lights?

A. I didn't know what kind of lights they were.

Q. Were you in the front seat?

A. Yes, I was in the front seat.

The Court: A little louder, Mr. Monahan, so the court reporter can hear you.

Mr. Felton: Q. Who was beside you?

A. Mrs. Wilkerson.

Q. Was she awake or asleep? A. Awake.

Q. Was she close to her husband?

A. Well, just as close as you could get three in the front seat.

Q. Did he have his arm around her or did she have her arm around him? A. No.

Q. What was the speed of the car? [201]

A. I couldn't estimate that.

Q. Did you have one or two lights on the road?

A. Two lights.

Q. Did you look at the car before the accident?

A. Yes, I have ridden in the car several times.

Q. I know but I am not interested in what you did in the past; I want to know if you looked at the

(Testimony of Robert Monahan.)

car before the accident to see whether the lights had been burning.

A. You could usually tell if there were one or two lights on there, on the car. There were two lights.

Q. And if the lights were on you could see the road pretty well that night prior to the accident?

A. Yes, sir.

Q. If the weather was clear?

A. Yes, that is right.

Q. How many lights did you see on the car that was up beside the people?

A. One headlight is all I seen. It looked like a spotlight.

Q. And was it turned in your face or to the side of the road? A. Pardon?

Q. Was it turned in your face or to the side of the road? A. I couldn't say to that.

Q. Did it blind you? [202]

A. It did not blind me, no.

Q. Now, this is the top of the hill. Now, how far down was it that that light was upon you?

A. Just as quick as we got over the hill.

Q. As quick as you came over the top of the hill the light came in your face and blinded you?

Mr. Brown: If the Court please, I object to counsel's putting words in the mouth of the witness.

The Court: The objection sustained. He said that the light did not blind him.

Mr. Felton: Q. If the light didn't blind you,

(Testimony of Robert Monahan.)

then, you could see this shoulder of this road down all the way in spite of the other car?

A. Well, I think you could on the road but lights don't shine on the shoulder of the road, they shine out.

Q. Do you disagree with the state patrolman about the correctness of this 272 feet, that this is 272 feet down here?

A. I never measured it.

Q. When did those people first come into your lights then?

A. Well, just as quick as your lights would hit the road as you came over the crest of the hill.

Q. How far over the crest of the hill could you distinguish an object with those lights?

A. I couldn't say as to that. [203]

Q. Could you distinguish it 200 feet?

A. I couldn't—I doubt if you could that far.

Q. Could you distinguish an object 100 feet?

A. Probably could.

Q. And could you that night see objects on the road 100 feet ahead of your car?

A. Maybe not in that spot but you could see.

Q. In other words, you had good headlights?

A. Sure.

Q. And they were adjusted the way you figure?

A. Yes.

Q. And you could see on the road and the road was open and straight? A. Yes, sir.

Q. And the people were perfectly apparent that they were on the roadway, weren't they?

(Testimony of Robert Monahan.)

A. Yes.

Mr. Felton: That is all.

Mr. Brown: That is all.

(Witness excused.)

LORRAINE MONAHAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination [204]

By Mr. Brown:

Q. Mrs. Monahan, were you the wife of the man that was just on the stand?

A. Yes, I was.

Q. And you were in the car that evening?

A. Yes.

Mr. Brown: I am trying to make this very short, your Honor, leading a little bit if it is permissible.

Mr. Felton: I will go along with you except as to the main part.

Mr. Brown: Q. Where were you riding in the car as you approached the scene of the accident?

A. I was in the back seat in the lefthand corner.

Q. I beg your pardon?

A. I was in the lefthand corner in the back seat.

Q. Did you see anybody on the highway?

A. No, I didn't.

(Testimony of Lorraine Monahan.)

Q. Did you feel the impact?

A. Yes, I did.

Q. At the time you felt the impact of the car striking some object or body where was the car on the highway? A. What was that?

Q. When you felt the impact was the car on the pavement? A. Yes, it was.

Q Was there any time as you approached this point where [205] the car was off the pavement on the shoulder? A. No.

Q. And about where on the pavement was the car when you felt the impact?

A. No, I don't know exactly. I was in the back seat and we were talking and I don't know.

Q. Now, just prior to this accident at any time do you know the rate of speed the car was traveling at? A. No, I don't.

Q. Well, would you have known if it was a high rate of speed?

A. Well, if it had been a high rate of speed it looks like when we stopped that we would have went forward, but we didn't.

Q. You drive an automobile? A. Yes.

Q. And have driven one for how long?

A. Oh, for about ten years.

Q. Now, you all got out of the car after it stopped? A. Yes, we did.

Q. And inquire from these people or went over to these people?

A. Well, we went over to see over where the people were lying.

(Testimony of Lorraine Monahan.)

Q. Did you se an object picked up on the highway? [206] A. No, I didn't .

Q. That night? A. No, I didn't.

Mr. Brown: You may examine.

Cross Examination

By Mr. Felton:

Q. You were in the back seat, weren't you?

A. Yes.

Q. And what was your position in that seat?

A. I was in the lefthand corner.

Q. That was directly behind the driver?

A. Yes.

Q. That puts you down pretty far; you don't see up very far, do you? A. No.

Q. There had been an accident to the right fender of this car sometime before, had there?

A. Yes.

Q. And it had effected the headlight?

A. Well, I can't swear to that.

Mr. Felton: That is all.

The Court: Just a moment. Any further questions?

Mr. Brown: No, that is all, your Honor.

(Witness excused.) [207]

R. C. CHITTESTER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Chittester, what is your occupation?

A. Locomotive fireman.

Q. For the S. P. & S.?

A. S. P. & S. Railroad.

Q. And you were with this group the night of the accident, were you? A Yes, I was.

Q. Mr. Chittester, something has been said about drinking. What time did you people leave Wishram that evening?

A. Oh, I would say we left Wishram about eight o'clock, p.m.

Q. And where did you go?

A. To The Dalles, Oregon.

Q. And where did you go; did you go to a dance?

A. We were some time at the Highway Club and some time at the Hanley Club.

Q. What did you do?

A. Had some drinks and supper.

Q. Did you have your supper there? [208]

A. Yes, sir.

Q. Did you dance? A. Yes.

Q. And did you have anything to drink after supper before you left?

A. Oh, we might have had one drink after supper.

(Testimony of R. C. Chittester.)

Q. What time did you leave there?

A. Well, we left there approximately twelve-forty-five or one o'clock.

Q. Approaching the scene of the accident, where were you sitting in the car?

A. What is that?

Q. Where were you in the car?

A. On the righthand side in the back seat.

Q. In the back seat? A. Yes.

Q. Just prior to the accident, do you know how fast your car was traveling?

A. Well, I would say that he wasn't traveling over forty miles an hour at that time.

Q. You drive also? A. Yes, sir.

Q. And also you are on a locomotive?

A. Yes, sir.

Q. Now, did you see anybody on the highway as you [209] approached the scene of the accident?

A. Well, no.

Q. When were you first conscious that it struck somebody; or did you see the people before they were struck? A. No, I didn't.

Q. Now, was the car prior to that time at any time off of the highway? A. No.

Q. Or on the shoulder? A. No.

Q. Did you notice the car change its direction at any time just prior to the accident?

A. Just before the point of impact it swayed to the left, it swerved to the left.

Q. You felt the impact? A. Oh, yes.

Q. And did you measure the distance?

(Testimony of R. C. Chittester.)

A. Well, I didn't measure with a tape.

Q. And how far from the point of impact did it go to where the car stopped?

A. I would say that it swerved directly across the road and north and it was from thirty-five to forty feet from where the point of impact to where it stopped.

Q. Now, did you pick up any object or see any object on the road that night? [210]

A. Yes, I did.

Q. What did you see after the accident?

A. I picked up a brown moccasin type shoe, a woman's shoe.

Q. And where was that on the highway?

A. It was lying on the center line of the highway.

Q. Was there anything else on the pavement or road? A. Yes.

Q. What was that?

A. A red hunter's hat.

Q. What is that?

A. Red hat that men wear.

Q. Red hunter's hat? A. Yes, sir.

Q. Now, where was that hat?

A. The hat was behind—well, it would be up behind the point of impact, evidently as though somebody had lot it in the road.

A. What did you do with the shoe?

A. I took the shoe and brought it over to where Mrs. Corbett was lying in the ditch and put it down alongside of her.

(Testimony of R. C. Chittester.)

A. Did you see a soldier there that night?

A. I did.

Q. How many soldiers were there? [211]

A. Well, they say that there was two soldiers there. I only talked to one.

Q. Was that the young man who has been on the stand, Mr. Merrill?

A. Yes, it was Mr. Merrill.

Q. Did you hear him talking to the defendant?

A. I did.

Q. Who else was there when you talked?

A. Mr. Monahan was there and—and Miss Wilson when we were trying to get Mr. Merrill's name.

Q. And did Mr. Merrill give you his name?

A. Well, he didn't want to at first but he did.

Q. Did Miss Wilson participate in that conversation with the soldier? A. She did.

Q. Now, another car came along almost immediately after the accident?

A. Yes, several cars and trucks.

Q. Well, one of them proceeded right on to call an ambulance, is that right? A. He did.

Q. And you remained right there until after the officers arrived?

A. Yes, I was there until everybody had gone and the last car had left. [212]

Mr. Brown: That is all. You may examine.

Cross Examination

By Mr. Felton:

Q. Did you give Mr. Merrill's name to the officers when they came down?

(Testimony of R. C. Chittester.)

A. No, I didn't. Mr. Wilkerson did.

Q. He gave Mr. Merrill's name to which officer?

A. Well, I don't know. He had his name there but to which officer he gave it to I don't know.

Q. He gave it one of them, though?

A. I was under the impression that he did.

Q. And you could see down the road when you were looking out of that car that night, couldn't you?

A. Oh, I could see for a short distance, yes.

Q. The lights were ordinary good lights and you could see if you looked?

A. If I raised up over the front seat I could see all right.

Q. If you had raised up over the front seat you could see down the road clearly? A. Yes.

Q. What kept you from seeing?

A. Oh, I had nothing to watch out for.

Q. But you could see when you looked, couldn't you? A. Yes, sure. [213]

Q. And it was an ordinary dry clear night?

A. It was a dry clear night.

Q. And the windshield wasn't obscured?

A. No.

Q. And the windshield was clean, was it?

A. Ordinarily clean as you can keep them. It had——

Q. Ordinarily nothing to keep you from seeing if you looked, is what I am asking you.

A. Yes.

Mr. Brown: He has answered that question.

(Testimony of R. C. Chittester.)

Mr. Felton: Q. You say that the car swerved to the left? A. Yes.

Q. Before striking these people? A. Yes.

Q. And you did not see the people before they were hit? A. No, I didn't.

Mr. Felton: That is all.

Redirect Examination

By Mr. Brown:

Q. Did you say that the car swerved or turned; I don't know what you said?

A. Well, it was like a car applying the brakes to make a sudden left turn and you came around and could feel it.

Mr. Brown: That is all. [214]

Mr. Felton: Just one more question.

Recross Examination

By Mr. Felton:

Q. Did any of the officers ask you any questions?

A. No, they didn't.

Q. Nobody that night asked you any questions at all?

A. Oh, they asked me what car I was with, what party.

Q. Which one of the officers asked you questions?

A. I think it was Mr. Woodward.

Q. Mr. Woodward, the Sheriff?

A. Yes, sir.

Q. And that was the time they told Mr. Merrill's name?

(Testimony of R. C. Chittester.)

A. I can't say whether that was the time or not.

Q. You were there when Mr. Wilkerson got Mr. Merrill's name, weren't you? A. Yes.

Q. And he got his name and full address?

A. He got his name but as to his address I don't know.

Q. Yes, I know but he got sufficient information to communicate with him?

A. I imagine he did.

Q. And that was passed on to the officers?

A. I can't swear whether that was passed on to the officers or not.

Mr. Felton: All right, that is all. [215]

Redirect Examination

By Mr. Brown:

Q. Do you know whether Wilkerson told the officers Merrill's name?

A. No, I don't.

Q. To refresh your recollection, didn't you hear a conversation between Merrill and Wilkerson when Wilkerson finally got the name and Merrill said not to tell the officers his name?

A. Well, he didn't want to tell them because he was on "French leave" and didn't want to go back to the base.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

MARGARET CHITTESTER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination

By Mr. Brown:

Q. Your husband was just on the stand?

A. That is right.

Q. Now, where were you riding in this car that night?

A. In the middle of the back seat.

Q. Now, as you approached the scene of the accident, [216] did you see anybody in the highway then? A. No, I did not.

Q. When were you first conscious of the fact that the car struck something?

A. Oh, when I felt it.

Q. When you felt it? A. Yes.

Q. Now, where on the highway was the car when you felt it hit something?

A. I couldn't say exactly where it was.

Q. Well, was it on the pavement?

A. Yes.

Q. Heading off the pavement at that time?

A. Not to my knowledge.

Q. Well, if it had been off, would you have known? A. I think I would have.

Q. Was it on the shoulder just prior to the accident? A. No.

Q. Or was it on the shoulder at the time of the accident? A. No.

(Testimony of Margaret Chittester.)

Q. And how far after you felt this impact did the car go before it stopped?

A. Well, as to the distance I can't say but it seemed like a very short distance.

Mr. Brown: Now, you may examine. [217]

Cross examination

By Mr. Felton:

Q. When you raised up and looked out of that car you could see ahead, couldn't you?

A. Yes.

Mr. Felton: That is all.

Mr. Brown: That is all.

(Witness excused.)

The Court: The Court will recess for five minutes.

JOHN C. WILKERSON,

the defendant here, called and sworn as a witness on his own behalf, testified as follows:

Direct Examination

By Mr. Brown:

Q. You are the defendant in this case?

A. Yes.

Q. And what is your occupation?

A. Brakeman on the S. P. & S. Railway.

Mr. Felton: I didn't get this man's name.

Mr Brown: He is the defendant.

(Testimony of John C. Wilkerson.)

The Court: Mr. Wilkerson.

Mr. Felton: Pardon me, yes, Mr. Wilkerson.

Mr. Brown: (Q.) Mr. Wilkerson, you own the car that you had been driving that evening? [218]

A. Yes, I do.

Q. Where had you been that evening?

A. To The Dalles.

Q. And what had you done at The Dalles?

A. We had been out to a little restaurant and dance hall, and we had supper and danced.

Q. And what time did you leave The Dalles?

A. Well, I don't know exactly but we were at the ferry there a little after twelve, but it was somewhere in the neighborhood of twelve-thirty or something like that.

Q. Now, approaching the scene of the accident, as you came over the brow of the hill what did you see?

A. Well, I seen a bright light and it was bright, rather bright at the time and I made some remark about it being bright.

Q. Now, what, if anything, did you do with reference to the car, did you slow down?

A. Well, I imagine that I did, but as far as recalling that I did——

Q. By the way, as you came over the brow of the hill, were you on a down grade from then on?

A. Yes.

Q. When you first saw any pedestrians on the highway about how far back were you?

(Testimony of John C. Wilkerson.)

A. Well, I couldn't see anything until I passed this care. [219]

Q. That was parked there?

A. Yes. And just shortly after that—just shortly after that I seen——

Q. What did you see in the highway; how many people?

A. Well, there was three people standing there and it looked like they were moving towards me but as to that, I can't say.

Q. How close together?

A. Well, they were rather close but my impression was that they were either carrying or supporting or holding someone.

Q. What did you do when you saw them?

A. Well, I just turned my car to the left and applied brakes immediately.

Q. And what part of your car struck them?

A. Oh, it was more of the left front side of the fender, or the right front fender, the side of the right front fender.

Q. Now, I hand you Identification 2 and ask you when that was taken.

A. That was taken—Oh, I don't remember the exact date but it was taken after the accident.

Q. What change, if any, was made between the time of the accident and the time of the taking of these pictures?

A. I replaced the bulb and the lense on the right headlight. [220]

Q. Other than the change in the headlight is

(Testimony of John C. Wilkerson.)

that a fair representation of your car, the damaged portion of your car after, immediately after the accident? A. Yes, it is.

Mr. Brown: I offer it in evidence, if your Honor please.

The Court: Show it to counsel.

The Clerk: Defendant's Identification 2.

Mr. Felton: May I ask one question.

Mr. Brown: Oh, yes.

The Court: Yes.

Mr. Felton: (Q.) Does this show the mark on the cowl?

A. Yes, it does, it is there.

Q. Will you point it out to me?

A. (Witness shows to counsel.)

Mr. Felton: I have no objection to the photograph.

The Court: It will be admitted in evidence.

Whereupon, photograph previously marked for identification, received in evidence as Defendant's Exhibit 2.

Whereupon, a photograph marked Defendant's Identification No. 3.

Mr. Felton: If you have any other pictures there that will show a fair representation, I have no objection to them.

The Court: Let me see that one. Mark those first. (Q.) The headlight is in the fender on your car, Mr. Wilkerson? [221]

A. Yes, it is.

(Testimony of John C. Wilkerson.)

Mr. Brown: (Q.) Now, I hand you Defendant's Identification 3, will you tell us what that is.

A. Yes, it is.

Q. Is that a picture of the car?

A. Yes, it is.

Q. Taken at the same time as Defendant's Exhibit 2? A. Yes.

Q. Simply from a different angle?

A. That is all.

Q. And other than the change in the headlight that you testified to, is that a fair representation from that angle of your car immediately after the accident? A. Yes.

Q. What is your answer? A. Yes.

Mr. Brown: I will offer this in evidence.

Mr. Felton: When you offer it I want to ask a couple of questions.

Mr. Brown: I am offering it.

Mr. Felton: I believe I can bring it out on cross examination later. I think I can bring it out on cross examination.

The Court: You are objecting to this because it is not sufficiently identified? [222]

Mr. Felton: Yes.

The Court: It will be admitted.

Whereupon, photograph previously marked for identification, was received in evidence as Defendant's Exhibit 3.

Mr. Brown: (Q.) Now, in Defendant's Exhibit 2, were there any of those dents in the fender prior to the accident that night?

(Testimony of John C. Wilkerson.)

A. No, it really isn't a dent. The accident that they were speaking of before, I merely scratched a fence post on the highway, on the side of the highway when I was pried to the post and pulled away from it.

Q. How long before the accident was it?

A. At least a month before the accident.

Q. And so the indentations shown in these pictures were the results of the accident on September 9th? A. Yes, they were.

Q. Now, how far did your car go after striking these people before it came to a rest?

A. Well, it was a very short distance, around anywhere between twenty and thirty feet, I would say.

Q. Now, just prior to the accident how fast had you been driving?

A. Oh, I imagine around forty, maybe forty-five miles an hour. [223]

Q. Were you off of the paved portion of the highway at any time?

A. No, I wasn't.

Q. You say that you turned to the north just prior to the accident?

A. When I seen the people I turned to the north.

Q. Now, you had driven this road before?

A. Oh, yes, a number of times.

Q. And were familiar with it? A. Yes.

Q. And had in mind the width of the shoulder on each side?

(Testimony of John C. Wilkerson.)

A. Well, there is a ditch and rocks and everything out to the righthand side.

Q. Now, after the accident what did you do? Just go ahead and tell the Court just exactly what you did.

A. Well, I got out of the car and I seen these people in the ditch and I looked at this one fellow and came to the conclusion that he was dead, and I seen the other lady but there was nothing I could do for her at the time.

Q. Did another car come along about the same time?

A. Yes, there was a car when I turned—I cut across the road in front of him when I stopped.

Q. And where did he go?

A. I asked him to call the ambulance and the state patrol if he could, and he left. [224]

Q. And you waited at the scene of the accident; you stayed there? A. Yes, I did.

Q. Now, did you have any conversation with this plaintiff Titus Corbett?

A. Well, there was some conversation there but I don't know just exactly what it was at this time.

Q. At the scene of the accident there were a couple of soldiers? A. Yes, sir.

Q. And was one of them Mr. Merrill, who was in here? A. Yes, Mr. Merrill.

Q. Did you have any conversation with him?

A. Yes, I did.

Q. And who else was there when you talked to him?

(Testimony of John C. Wilkerson.)

A. Well, my wife was there, Miss Wilson, was there, and well the rest of them was around close and there was another soldier there.

Q. And was Miss Wilson where she could hear your conversation? A. Yes, she was.

Q. Did she participate in the conversation?

A. Well, yes, she entered into it.

Q. With the soldier? A. Yes. [225]

Q. Now, there was something that was said about the difficulty of getting his name. Now, just tell the Court what happened there?

Mr. Felton: If the Court please, I ask that the witness be admonished not to give conversations.

Mr. Brown: (Q.) Did you have any trouble getting his name for a minute?

A. Yes, at first he didn't want to let me have it.

Q. And did you later give his name to the police officers?

A. No, I don't recall as I did. I don't know whether he got them or not. I had them on the little pad there and I don't recall whether I gave the pad to him or not.

Q. How long did you remain around the scene of the accident there?

A. Oh, I was there until after the ambulance had left for The Dalles.

Q. And all the parties that were involved were gone when you left?

A. Yes, I believe they were.

Q. And the officers also left?

A. No, the officers were there.

(Testimony of John C. Wilkerson.)

Q. Oh, which officers remained there?

A. Mr. Hyland and Mr. Woodward.

Q. Then you left? [226] A. Yes.

Mr. Brown: You may examine.

Cross Examination

By Mr. Felton:

Q. Well, now, the lights of your car were in perfectly good working order that night, were they?

A. Yes, they were.

Q. And they were adjusted so that you could see the ordinary 150 feet or 200 feet down the highway, were they? A. Yes.

Q. And you were able by such lights to distinguish an object 100 or 200 feet down the highway?

A. I would ordinarily see it, yes.

Q. Where the road was clear and straight?

A. Yes.

Q. And you noticed the lights of which vehicle, now, the one parked on the top of the hill or the one that somebody has testified to as being halfway down the hill from the point of the impact?

Mr. Brown: I object to the testimony on this because there is a serious question whether there was some other car parked there.

The Court: I will sustain the objection as to the form of the question.

Mr. Felton: All right, I will reframe the question. (Q.) [227] When you topped the hill what did you first see? A. A light.

(Testimony of John C. Wilkerson.)

Q. One light or two or what?

A. I was under the impression that it was one light.

Q. Was it from a car or could you tell?

A. Well, it was from a car or some vehicle. It was a headlight.

Q. Did it blind you, or didn't it?

A. It did blind me.

Q. And could you see the road when that light blinded you?

A. I could see on the shoulder of the road.

Q. But you couldn't see the middle of the road while that light was blinding you?

A. Well, I could see for a short ways, not a normal distance.

Q. How far?

A. Well, it was just a short distance past the car.

Q. I mean, was it ten or twelve feet?

A. Yes, something like that.

Q. And, then, the major portion of the road was blotted out by this light that you saw?

A. Well, the road ahead of me was after a certain distance.

Q. And how long did that blinding continue? [228]

A. Well, it was just after I passed the car with the light on that I saw the people in the road, which would be a very short distance?

Q. How close to these people were you before the blinding ceased?

(Testimony of John C. Wilkerson.)

A. Oh, I imagine in the neighborhood of—oh, anywhere between thirty and forty feet, I imagine.

Q. And you saw these people thirty or forty feet before you hit them?

A. Something like that.

Q. But before that you were totally blind as to any objects where they were?

A. No, not totally blind, no.

Q. Well, could you have seen them before if you had looked?

A. I might have been able to see them had they been off of the road, because in driving a car, as you know, you can see the side of the road. Even if the lights are blinding right here (illustrating) you can still have a view to your right.

Q. You were blinded by the light as to a portion of the road? A. Yes, partly.

Q. And did you continue to drive at high speed while you were blind? [229]

A. No, sir, I wasn't at high speed at any time.

Q. What speed were you making?

A. Thirty-five or forty miles.

Q. Well, you continued to drive that while you were blinded?

A. No, I don't think I did.

Q. What speed were you making during the time you were blinded or after you were blinded?

A. Well, I wasn't looking at my speedometer at that time.

Q. Approximately what speed?

A. Well, less than I had been normally going.

(Testimony of John C. Wilkerson.)

Q. Did you reduce your speed five miles an hour? A. I imagine I did.

Q. Did you reduce it ten miles?

A. I can't say as to that.

Q. It was probably somewhere between five and ten miles an hour? A. I imagine.

Q. And then you were driving somewhere between thirty-five and forty miles an hour while you were blinded by this one light on another vehicle, is that true?

A. I imagine I was going at that speed but I wasn't entirely blinded by that light.

Q. Well, then, could you see the highway? [230]

A. I could see a portion of the highway.

Q. But you were blind as to a major portion of the highway, were you not?

A. Well, I want to state that I could see a small part of the highway at that time.

Q. You could see the portion of the highway that you were traveling on for how far ahead, then?

A. Well, that is hard to say.

Q. Well, you give your best estimate.

A. Well, I can't say but after you pass a car——

Q. I don't want generalities.

A. You can see for a certain way after the lights are gone, that blindness doesn't last for two or three minutes or anything like that.

Q. I don't want generalities, I want to know what you did that night. How far could you see in the path of your own vehicle while the light was in your vision.

(Testimony of John C. Wilkerson.)

A. I can't make any statement on that.

Q. But you could see for a considerable distance? A. I could see a ways.

Q. And did you later discern what this light was one?

A. No, I wasn't interested in that at that time.

Q. Later?

A. No, I had no way of telling later.

Q. Did you tell later after you investigated the matter? [231]

A. No, I never did investigate as to which car the light was on.

Q. In your opinion, it was some light or it was a spotlight, or did I take that from some other witness?

A. It was my impression that it was either a car light or a spotlight. I had no way of telling because when you pass a car you cannot see.

Q. Did the light appear to be moving?

A. No, I cannot say whether the light was moving or not.

Q. But then you topped the top of the hill and you passed the car and your vision was open as to the part of the highway you were driving on, is that right?

A. Yes, part of it was open.

Q. And the blinding was only as to the part of the highway you were not driving on, is that right?

A. I can't see your question.

(Testimony of John C. Wilkerson.)

Q. I don't want you to see the purpose of it; I want you to see an answer of it as to the fact.

Mr. Brown: I was going to object, your Honor, before but I object to the question because it is again putting in the witness' mouth something he didn't testify to. What he testified to was he could see the shoulder of the highway.

The Court: What was the question.

(Last question read.) [232]

A. I don't know what there was, or know what highway you mean I was driving on. I can't understand what part to answer.

Mr. Felton: (Q.) All right, could you see the part of the highway you were driving on?

A. Yes, a portion.

Q. What portion? If you will answer my question we will be through on this.

A. Away on the shoulder of the highway.

Q. And how far could you see?

A. I can't make no estimate of that part.

Q. Now, what part of the highway were you driving on?

A. Well, I was in what would be the south lane of the highway.

Q. Were you close to the yellow line or to the shoulder?

A. Well, I would say I was driving approximately in the center of the lane.

Q. Now, that is the black top part?

A. Yes.

Q. And that would be the center of the lane?

(Testimony of John C. Wilkerson.)

A. Yes.

Q. Do you know the width of your car?

A. No, I don't know.

Q. It was approximately five feet?

A. I can't tell you. [233]

Q. And that lane is approximately nine and three-quarters feet wide? A. I can't say.

Q. Do you know how wide the shoulder is?

A. No, I never made no measurement of that either.

Q. You heard the state patrolman testify?

A. Yes.

Q. Do you have any reason to disput his testimony in any manner?

A. No, I can't say as to that.

Q. The road that you could see was the road directly in front of the right side of your car?

A. Well, I can't tell you. When I passed the car at the meeting point of the car I could see for a few feet and after you got by the car my eyes came back to normal and I could see for a ways.

Q. Where did you pass this car in reference to the top of the hill?

A. Well, it was—there was more than one car there and in passing cars I never make—pay too much attention to the cars when passing them on the side of the road.

Q. Your car killed a man that night. Did you pay any attention to the car that night.

Mr. Brown: If the Court please, I object to that question. [234]

(Testimony of John C. Wilkerson.)

The Court: Objection sustained.

Mr. Felton: I didn't mean anything except to call attention to the seriousness of the occasion.

Mr. Brown: Well, he has been perfectly serious about it.

Mr. Felton: Q. Didn't you pay attention that night or didn't you think of the matter after the accident?

A. Certainly, I gave the matter quite a little bit of thought after the accident.

Q. You had been drinking quite a bit at the dance? A. We had quite a few drinks.

Q. What did you do after this light cleared in your vision?

A. I eased up on the accelerator.

Q. You did not put on the brakes?

A. No, I had no reason to put on the brakes.

Q. You did not turn off the ignition but you eased up on the accelerator?

A. That is right.

Q. Did you totally ease up on the accelerator or part way?

A. I eased up all the way as far as I know.

Q. Did you tell the officers, specifically the state patrolman Hyland, that night that you did not see the people until you hit them?

A. No, I did not.

Q. That statement, then, is not true? [235]

A. No, sir. I seen the people and turned and applied brakes before I hit the people so I must have

(Testimony of John C. Wilkerson.)

seen them. Otherwise, I would have had no reason to turn the car had I not seen them.

Q. Why didn't you turn the car to the right and go around these people?

A. Because there is a ditch in there and a lot of rocks and the left lane of the highway was open.

Q. Then, you meant to get clear across in front of them and get into the other lane?

A. Yes, I had as much chance as going to the right.

Q. Now, there was enough room to the right of them to get by?

A. Well, there could have been.

Q. If you had gone around?

A. Yes, but I am not in the habit of driving off the highway.

Q. Even if you had seen people on the highway?

A. If there had been an object on the lefthand side of the highway I would have gone around, or an obstruction there.

Q. Could you have gone around them? Around the right side?

A. Well, I would say that they were just as close to the yellow line as they were to the edge of the black top.

Q. But there was room enough to go around the right?

A. I couldn't say as to that. [236]

Q. How far over to the yellow line would you have to go to pass them on the left?

A. With the right side of my car?

(Testimony of John C. Wilkerson.)

Q. Yes.

A. I would have just to clear the yellow line to have sufficient distance.

Q. Now, who took these pictures?

A. The Elite Studio, at the Elite Studio at The Dalles.

Q. When were they taken?

A. If I can recall it was in March.

Q. When? A. It was in March.

Q. And you say nothing had been done to your car except that the headlight had been replaced?

A. No, sir, nothing.

Q. And had that been ironed out at all?

A. No.

Q. There was no change from the time of the accident until these pictures were taken except that the bulb and lense in the headlight had been replaced, is that true?

A. At the scene of the accident we pulled the fender back just enough to clear the tire, and outside of that, that is all.

Q. All right, you did pull the fender back some?

A. Just a little, just a small matter is all, not over [237] an inch.

Q. But you didn't pull out any bumps or anything of that nature? A. No, sir.

Q. There had been a former accident on this fender, hadn't there?

A. No, sir, it wasn't an accident.

Q. The fender had been welded up?

(Testimony of John C. Wilkerson.)

A. Merely scratched the paint on the post of the highway.

Q. You say that there was a mark on the cowl that got there that night? A. Yes, sir.

Q. This is Defendant's Exhibit 3. Will you point out to His Honor where that is.

A. It is right there (showing to the Court).

The Court: Will you put an "X" there, please.

A. A cross.

The Court: The witness is marking an "X" on Defendant's Exhibit 3 to show the place.

Mr. Felton: And will you also do the same thing to Defendant's Exhibit 2. The defendant here is also marking an "X" on Exhibit 2.

Q. You say that a commercial photographer took those pictures? A. Yes, sir. [238]

Q. You don't know what kind of camera he used?

A. No, sir, I wouldn't have any way of knowing.

Q. Do you know what lense opening he used?

A. No.

Q. You never had access to the films?

A. No. But I have the car.

Q. Do you know where the films are?

A. No, sir.

Q. Do you know whether the films are retouched or not? A. No, sir.

Q. Do you know the type of film or size of development or size of film that those pictures came from?

A. No, sir, I am not familiar with photography.

(Testimony of John C. Wilkerson.)

Q. You were not there when they were printed?

A. No, sir.

Q. You don't know what happened at the time they were developed do you? A. No.

Q. In other words, all you know is that the pictures came from the photographer, is that correct?

A. I know that the car is my car and I know that I had those pictures taken.

Q. How were your brakes on that car?

A. I know that they were in good condition.

Q. How quickly could you stop the car traveling at [239] thirty-five miles an hour?

A. I don't know. There would be only one way to find out and that would be to try.

Q. Well, you know that sixty-three feet of skid-marks represent the time it would take, wouldn't it?

A. Well, it is possible, yes.

Q. No, you said you swerved the car before you hit the people?

Mr. Brown: If the Court please, I object to counsel putting words in the witnesses' mouth.

The Court: Objection sustained.

A. I didn't say I swerved the car. I turned the car. I just turned the wheel and the car swerved.

Mr. Felton: I didn't mean to express it incorrectly. The terms are interchangeable. We use them interchangeably and probably that was wrong.

Q. But you turned the car, and how far did you go before you hit these people?

A. I never did measure the distance.

Q. How many feet up the highway?

(Testimony of John C. Wilkerson.)

A. I never measured it.

Q. You have no estimate at all?

A. I imagine that I swerved there somewhere in the neighborhood of, oh, I don't know, I can't say exactly or anything. It seems like fifteen or twenty feet, more or less.

Q. And did you put on your brakes at the same time? [240] A. Yes, sir.

Q. And, then, fifteen or twenty feet of these skidmarks represent a time before you hit the people?

A. Yes, sir, there were skidmarks before I hit the people.

Q. Fifteen or twenty feet of them and the other sixty-two or sixty-three feet, whatever it was, was after you hit the people?

A. I never measured it.

Q. Do you understand this diagram well enough to remember your angle across the road after the skidmarks?

A. I know that the angle is a little bit off with reference to the skidmarks.

Q. Well, I know, but the angle across is approximately correct?

A. Well, I don't know what the angle is.

Q. Well, your estimate is that it was a greater or lesser angle than this?

A. Well, it was an angle similar to this thing. I think it was shorter.

Q. You think it was harder across the highway?

A. Yes.

(Testimony of John C. Wilkerson.)

Q. It was in a more abrupt angle?

A. I couldn't say as to that exactly but I am pretty sure that it is.

Q. Then, you traveled a considerable distance north from [241] where you hit the people from where you had been traveling when you saw them?

A. A distance north?

Q. Yes.

A. Yes, I went across the lane of this highway.

Q. Yes?

A. I went across to the left lane of the highway.

Q. And you were into the left lane of the highway before you hit these people?

A. I believe part of my car was at the time. I wasn't paying any attention to where that lane was.

Q. You afterwards made some investigation of the accident, didn't you? A. Yes, I did.

Q. And you took down the names of the witnesse? A. Yes.

Q. And do you have the paper that you used to take them down on? A. I have it.

Q. Do you have it with you?

A. No, I haven't it with me.

Q. Where is it?

A. It is at Wishram, at my home.

Q. Well, you knew you were coming to this trial?

A. I didn't know it at the time, no. [242]

Q. I mean that that is still at your home at Wishram? A. Yes, sir.

(Testimony of John C. Wilkerson.)

Q. But you knew that you were coming up here to testify at the trial?

Mr. Brown: Objected to as wholly immaterial.

Mr. Felton: Yes, I withdraw it if it is objected to. That is all.

Mr. Brown: I think that is all, your Honor.

(Witness excused.)

HELEN WILKERSON

called and sworn as a witness in behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. You are the wife of the defendant?

A. Yes.

Q. Where were you riding in the car that evening?

A. I was sitting in the center in the front seat

Q. Now, as you approached the scene of the accident, do you know how fast the car was traveling?

A. No, I do not. I imagine—I would say about thirty-five or forty.

Q. When you first saw some people on the highway how far back was the car? [243]

A. Well, I don't recall how far back the car was but I saw these three people on the middle of the road and at the same time that I hollered, "There'

(Testimony of Helen Wilkerson.)

people in the road," my husband applied his brakes and turned to the north.

Q. Now, prior to that time had the car been off of the highway, just prior to this, on the shoulder of the road?

A. Had been off of the highway?

Q. Yes? A. No.

Q. Was it on the shoulder or over the shoulder at any time? A. No.

Q. After the accident you got out of the car?

A. Yes, sir.

Q. And you husband talked to these people?

A. Yes.

Q. Now, how far did your car go after you struck the people, do you think, or would you say?

A. Well, I don't know how far it went.

Q. As a matter of fact, you were greatly shocked by the accident, weren't you? A. Yes.

Mr. Brown: You may examine.

Cross Examination

By Mr. Felton: [244]

Q. You say you were in the middle of the front seat when this thing happened? A. Yes.

Q. It was pretty hard for you to see over this cowl in there? A. Is it what?

Q. It was pretty hard for you to see over that cowl in the middle of the front seat, wasn't it?

A. Well, not too hard.

Q. Were you watching the road or were you asleep at that time?

(Testimony of Helen Wilkerson.)

A. I was watching the road.

Q. Did you see these people just before they were hit?

A. Well, I saw them just before my husband turned the wheel.

Q. You heard him testify that he turned it just as far as he could? A. What?

Q. Turned to the left as far as he could?

Mr. Brown: That is objected to, if your Honor please.

The Court: Objection overruled.

Mr. Felton: Q. You heard your husband testify as to turning the car? A. Turning the car?

Q. Yes. [245] A. Yes.

Q. You heard him testify that he turned it at a sharp angle to the left, did you not?

A. Well, I can't say whether he said a sharp angle.

Q. Well, now, he turned to the left at a sharp angle?

A. Yes, he turned to the left at an angle.

Q. And at the same time he put on his brakes and fifteen or twenty feet later he hit these people?

A. Well, I can't say as to how many feet.

Q. Well, now, you saw these people on the highway before they were hit. How were they proceeding?

A. They were walking three abreast on the highway.

Q. Walking how; three abreast?

(Testimony of Helen Wilkerson.)

A. They were walking this way across the highway (illustrating).

Q. Arm in arm or how?

A. Well, they were close together.

Q. How close together?

A. Well, I can't say.

Q. Were they all standing up?

A. I think so.

Q. And who was on the road, that is the part of the highway, that would be the lefthand part of the highway where you were going, which one of the persons was on the road?

A. Which one of what? [246]

Q. Of these Indians were on the road?

A. I can't say to that.

Q. And which one was next to which one?

A. I don't know.

Q. Where was Mrs. Corbett; where was she standing? A. I don't know.

Q. You saw her, didn't you?

A. Yes, but they were all wearing slacks, as I remember, that night and they all looked like men to me and I couldn't tell one from the other.

Q. And they were all standing and walking together? A. Yes, they were.

Q. And they were walking close together and solidly, were they? A. What?

Q. Solidly together?

A. I—Oh, I wouldn't say.

Q. Well, were they strung out in a line or which? A. Yes, I would say they were.

(Testimony of Helen Wilkerson.)

Q. And all standing up? A. Yes, sir.

Q. And which way were they walking?

A. Which way were they walking?

Q. Yes, which direction?

A. Towards us. [247]

Q. And where in the highway?

A. I would say in the middle of the highway.

Q. On the yellow line?

A. In the middle of the line, I should say, in which we were driving.

Q. In the middle of the right hand lane of the highway? A. Yes, sir.

Q. And where was your car proceeding; in the middle of that lane? A. I would say so.

Q. Was anyone of them ahead of anyone?

A. What do you mean; I don't understand your question.

Q. Well, was one closer to you than the other or were they strung at right angles across the highway? I am trying to get their position one way or another.

A. They were walking all three together.

Q. Four wasn't it?

A. I couldn't see the fourth one.

Q. You saw three people walking together?

A. Yes, sir.

Q. And all apparently even together and just walking up the highway? A. Yes.

Q. And you didn't see the fourth one?

A. I don't know where the fourth one was, I couldn't [248] see a fourth one.

(Testimony of Helen Wilkerson.)

Q. But you could see the road with your headlights?

A. We could see the road with our headlights?

Q. Yes.

A. Yes, before we came to this bright light.

Q. And what happened when you came to the bright light?

A. I couldn't see anything.

Q. You couldn't see anything?

A. No, I couldn't see anything.

Q. For how long a time?

A. Until we passed it.

Q. And how soon after you seemed to be blinded did you hit these people?

A. As to that I can't say.

Q. How many feet, would you say?

A. I couldn't say.

Q. Was it before or after your husband swerved the car that you ceased to be blinded?

A. I couldn't say.

Q. Was it before that that you ceased to be blinded? A. I don't know.

Q. Your best estimate. You know that you were suddenly blind and you swerved your car and you hit them and the accident happened, is that it?

A. Well, I know that I was blinded by the lights of [249] the car and I saw these people and at the same time my husband applied brakes and turned to the north.

Q. And you heard your husband testify that he

(Testimony of Helen Wilkerson.)

saw them fifteen or twenty feet before he hit them, didn't you? A. Yes.

Q. And that was the time that you ceased to be blinded, was it? A. It must have been.

Q. And up to that time you couldn't see the road at all. A. (Nodding head.)

The Court: Answer so that the reporter can hear you. He can't see you shake your head.

Mr. Felton: Pardon me, I should have noticed that.

Q. Your husband slacked speed as you came up over the hill, by easing up on the accelerator?

A. Yes.

Q. And at the time he let up on the accelerator he was going down grade? A. Yes.

Q. Quite a down grade in the highway?

A. I don't know anything about down grades.

Q. Did you notice the speedometer at any time, say, a half mile before the accident that night to see what speed he was driving.

A. I don't know that I did. [250]

Q. What was his usual ordinary speed on the highway?

A. It was around forty to forty-five.

Q. And that is what he was driving that night?

A. Yes.

Mr. Felton: I think that is all.

Mr. Brown: That is all.

(Witness excused.)

Mr. Brown: If the Court please, I don't really see why this question of the release of the body

was brought into the case. I don't think it is material. I have the release of the body but I don't think it is material whether the coroner signed the death certificate.

The Court: I don't see its materiality, no.

Mr. Felton: What was this? I didn't hear, your Honor, I am sorry.

The Court: Mr. Brown has raised the question here as to whether or not this body was released by the coroner or by somebody else. I can't see the materiality at all.

Mr. Brown: I raised the question.

Mr. Felton: I don't think it is material.

Mr. Brown: In that case, I rest.

The Court: Do you have any rebuttal?

Mr. Brown: Oh, your Honor, on the matter of the speed law I have a witness to testify as to the date that the Supervisor of Highways issued the fifty mile an hour limit. [251] Would you care to have him show that. It is a matter of the proclamation of law. But he is here.

The Court: Would counsel be willing to stipulate as to the date it was restored?

Mr. Felton: Well, I could stipulate if I knew. I know it came after "VJ" day.

The Court: You could make a stipulation but if you desire to make formal proof, you may.

GORDON E. HYLAND

recalled as a witness on behalf of defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Did you check to determine the date when the proclamation limiting the speed to thirty-five miles an hour was revoked?

Mr. Felton: I object to that, if the Court please, as not the best evidence.

The Court: I am going to permit the witness to answer. It is a matter of which the Court can take judicial notice.

Mr. Felton: If the Court takes judicial notice on it, this is merely for the Court.

The Court: If the witness has the date on it, it will save me the trouble of looking it up. [252]

The Witness: I received notice from the chief of my department that the Director of Highways had released the speed limit from thirty-five miles an hour on August 25, 1945.

Mr. Brown: Q. That was directly after the Japs surrendered?

A. I believe it was right after gas rationing. It was August 25, 1945.

Mr. Brown: That is all, we rest.

The Court: The other witnesses may be excused, and Court will recess until one-thirty.

Afternoon Session, May 9, 1946, 1:30 o'clock, p.m.

Mr. Felton: You have rested?

Mr. Brown: Yes, we rested.

Mr. Felton: I think we have one witness on rebuttal, your Honor, and then the argument.

The Court: All right.

TITUS CORBETT

recalled as a witness on behalf of plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Mr. Corbett, you heard the police officer testify as to the condition of the shoulder between where you and [253] your wife were in the ditch and where the ambulance stopped and loaded her, didn't you? A. Yes, sir.

Q. And were there any people walking on that shoulder between that time of the accident and the time that the officers came?

A. Yes, there was.

Q. And to what extent did people walk on that shoulder?

A. Well, people came back down the road looking at this body and also looking down in the ditch where my wife was staying and they were all using this shoulder walking around and milling around.

Q. To what number?

A. Well, I would say that at least fifteen or twenty people passed on the shoulder. And also we loaded my wife over the shoulder.

(Testimony of Titus Corbett.)

Q. And how many people did it take to load your wife over the shoulder?

A. Oh, probably three or four.

Mr. Felton: That is all.

Mr. Brown: No examination.

(Witness excused.)

Mr. Felton: The plaintiffs now rest.

(Whereupon, after completion of argument of counsel, the Court gave the following oral opinion:) [254]

OPINION OF THE COURT

The Court: The submission of a case of this kind to the Court without a jury places a heavier responsibility upon the Court than he would otherwise carry, obviously, because he must pass not only upon the facts of the case but the law as well; and as in this case as well as every case involving an automobile accident, it is necessary for the trier of the facts to pass upon direct conflict in the testimony and the evidence and determine the credibility of the witnesses.

This is no an unusual situation. There are nearly always two versions of every automobile accident. Human observation is imperfect. The opportunity to observe is incomplete particularly when an accident occurs as this one did in the nighttime; and human memory is fallible. With all these indeterminate factors, interest can do very remarkable things with the testimony of even honest witnesses.

And so, it is the usual thing when there is a collision or an accident of this kind that the witnesses have different and conflicting versions; and the interested parties, their relatives and friends, will testify as to one version and the other side to something that is irreconcilable and sometimes the direct opposite.

I might say, that in passing upon the credibility of the witnesses here, the Court must rely upon all of the usual aids and I do not believe it will serve any useful [255] purpose for me to detail what they are or to go into any extended or detailed analysis of the evidence.

The law that applies here I think is fairly simple. I do not believe that it is a case for the application of the Doctrine of Last Clear Chance. That seems to be conceded by counsel. The applicable law which governs pedestrians on the highway is that in walking along the highway they shall keep to the extreme edge of it and walk to their lefthand side facing oncoming traffic; and in case a car comes along it is the pedestrian's duty to step off of the paved or traveled portion of the highway so that the car may pass. In other words, it is the pedestrian's duty to give the right of way to the car, and I think it seems to be conceded here also that violation of this or any other positive safety statute is negligence per se.

Now, it seems to me that the problem as far as the Court is concerned is to determine whether or not the deceased and the plaintiff Mrs. Corbett were on the shoulder of the highway as they and their

witnesses have testified, or whether they were out on the main traveled portion or paved portion of this black top highway at the time this car struck them.

There has been no evidence of excessive speed and, according to the plaintiff's version, whether or not there was negligence on the part of the defendant driver [256] would depend upon whether or not he drove his car off of the main traveled portion of the highway and on to the shoulder. If he did so, it would be negligence. If he did not, of course, the accident would not have occurred. So, it seems to me that the case will be determined upon the question of whether or not these people were on the main traveled portion of the highway or on the shoulder.

It seems to me that the testimony of the state patrolman, who is one disinterested witness here, while it may be argued inferentially either way, leans or tends more toward the defendant's theory than it does towards the plaintiffs'. His testimony was that the skidmarks started about two feet inside of the paved portion of the highway and that there was no evidence of any travel or that the car had encroached upon the gravel shoulder which was three feet wide.

If we believe the plaintiffs' theory here, we must assume that these people were walking: Miss Wilson, behind her Miss White, Mrs. Corbett, and the deceased Frank, one behind the other, each on this gravel shoulder which was only three feet wide. I listened attentively to the testimony of all of these

witnesses and I noted that neither Miss Wilson or Miss White said that they stepped or jumped off of this gravel shoulder in order to avoid being struck by this car. Their testimony, as I recall it, was that they [257] remained where they were and that the right hand of each of them was struck, and that the car struck Mrs. Corbett who was behind Miss White and the deceased Frank who was behind Mrs. Corbett.

Now, in order to credit that story, it is necessary to believe that this driver who was along the highway traveling at not an excessive rate of speed, certainly being under the influence of liquor is not shown, suddenly for some reason unexplained, swerved off on to the gravel shoulder of the highway, missing the first two people, barely hitting their right hands, and struck the last two, and then turned his car back on to the highway and did not put on his brakes until he had gone on two feet on to the main traveled portion of the highway. It just doesn't seem to me that that could reasonably have happened at the rate of speed of forty miles an hour which the car traveled and not leave a mark which would be visible to the state patrolman on the gravel shoulder.

Now, I don't know whether or not the ex-serviceman was telling the full truth. I don't think that truthfullness depends upon whether or not you are in the Army or Navy or of the Indian race or White race. I don't think any race has any monopoly upon truthfullness by any means, and I don't think that the ex-serviceman was too accurate a witness.

I don't think, however, that his story was a complete [258] fabrication; and in order to find for the plaintiffs, it would be almost necessary to find that, because he did testify that these people were out on the paved portion of the highway and that is in accordance with the testimony of the other witnesses, the defendants Mr. and Mrs. Wilkerson and the passengers who were in their car. They all testified that the car swerved first and that then they either felt the impact or that they saw these people on he highway and that they were on the main portion of the highway at the time of the impact.

As to why the body of the deceased and why Mrs. Corbett after the impact were thrown off on the side of the road, I don't know. It has been said in some of the Washington cases that the behavior of automobiles and the persons struck by these automobiles is unaccounted for in many cases. As I remember the testimony, the main traveled portion of the highway was nineteen and a half feet wide and the shoulder on the south side was three feet wide, and so the distance from the center line of the highway to the outer edge of the shoulder would be about twelve and a half feet, and I think that the testimony is that these people were inside of the center line of the highway at the time they were struck. At any rate, looking at the four corners of the case, as I must pass upon the credibility of the witnesses and the weight of the evidence, [259] it is the finding of the Court that negligence has not been shown on the part of the defendant, and

that the deceased Frank and the plaintiff Mrs. Corbett were guilty of contributory negligence in walking on the paved portion of the highway and failing to step off at the approach of the oncoming car.

Mr. Brown: I will prepare findings based on your decision.

Mr. Felton: If the Court please, how long do we have to appeal; I don't know offhand in this court.

The Court: I would suggest that we look it up in the Rules of Civil Procedure.

Mr. Felton: Well, is it necessary to give Notice of Appeal at this time, or how much time do we have on it?

The Clerk: Judgment can be entered before Notice of Appeal.

The Court: Certainly, you wouldn't have to appeal from the announced decision of the Court; you would appeal after the entry of judgment.

Mr. Brown: While we are here, if it is all right with counsel, I will prepare findings and conclusions and submit them to him which may be sent to the Court to sign. Is that all right?

The Court: However, in order to have your record here, I am perfectly willing that the record show that the oral [260] notice of appeal is given.

Mr. Felton: I wish to give it.

The Court: But I wouldn't suggest that you rely upon that. At least you will have it if necessary.

Mr. Felton: I would like to ask that we be given at least sixty day for appeal.

The Clerk: You have got ninety days under the law from the date of entry of judgment or ninety days from the entry of the order denying motion for a new trial, less the number of days expired between the entry of judgment and the filing of the motion for a new trial. See Rule 73 of the Federal Rules of Civil Procedure.

Mr. Brown: Is it all right for Court to sign the Judgment in Spokane? Well, I will prepare findings and conclusions and present them to counsel before I submit them to the Court.

The Court: The Court will adjourn until tomorrow morning at ten o'clock. [261]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington,
Southern Division—ss.

I, Henry E. Neer, do hereby certify:

That I am the regularly appointed, qualified and acting Official Court Reporter of the District Court of the United States in and for the Eastern District of Washington.

That as such reporter I reported in shorthand the foregoing consolidated causes presented for trial before the Hon. Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington; that the above and foregoing pages numbered from 1 to 261, incl., contain a full, true, and correct transcript of the testimony introduced and the proceedings had on the trial of said causes, and that the same contains all objections made, and the rulings of the Court.

Dated this 15th day of July, 1946, at Spokane, Washington.

s/ HENRY E. NEER,
Official Court Reporter. [262]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Consolidated Civil Nos. 244 and 245.

TITUS CORBETT and MARTHA WOODS CORBETT, husband and wife,
Plaintiffs,

vs.

JOHN C. WILKERSON,
Defendant,

and

LOTTIE FRANK, administratrix of the Estate of LEVI FRANK, deceased,
Plaintiff,

vs.

JOHN C. WILKERSON,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These causes having heretofore been consolidated for trial and having duly and regularly come on for trial on the 8th day of May, 1946, the plaintiffs being represented by their counsel J. H. Felton

and Bernice Bacharach, and the defendant by his counsel Nat. U. Brown, Kenneth C. Hawkins and F. S. Senn, and the Court having heard the evidence and the arguments of counsel and being fully advised, makes the following

FINDINGS OF FACT

1.

Jurisdiction founded on diversity of citizenship and amount. The plaintiffs are citizens of Idaho, and defendant is a resident citizen of the State of Washington. [277] The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3000.00).

2.

On Sunday, September 9, 1945, at about the hour of 1:00 a. m. on a public highway No. 830, about twenty-eight miles west of Goldendale in the State of Washington, the plaintiff Martha Woods Corbett and the decedent Levi Frank were struck by an automobile owned and at that time being operated by the defendant John C. Wilkerson, and that as a result thereof the said Levi Frank was almost instantly killed and the plaintiff Martha Woods Corbett sustained personal injuries.

3.

That at the time and place of said accident the defendant John C. Wilkerson was operating his car in a careful and prudent and legal manner and was in no wise negligent.

4.

That at the time and place of said accident the decedent Levi Frank and the plaintiff Martha Woods Corbett were guilty of negligence in failing to walk upon the extreme left hand side of the highway as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of defendant's car and to step to the left off the paved portion of said highway as required by said section.

From which said Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

1.

That this cause should be dismissed with prejudice and with costs to the defendant.

Done this 27th day of May, 1946.

SAM M. DRIVER,
District Judge.

O. K. as to form:

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Plaintiffs.

Presented by:

NAT. U. BROWN,
One of the Attorneys for Defendant.

Filed: May 27, 1946. [279]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Consolidated Civil Nos. 244 and 245.

TITUS CORBETT and MARTHA WOODS CORBETT, husband and wife,

Plaintiffs,

vs.

JOHN C. WILKERSON,

Defendant,

and

LOTTIE FRANK, administratrix of the Estate of LEVI FRANK, deceased,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

JUDGMENT

These causes having heretofore been consolidated for trial and having duly and regularly come on for trial on the 8th day of May, 1946, the plaintiffs being represented by their counsel J. H. Felton and Bernice Bacharach, and the defendant by his counsel Nat. U. Brown, Kenneth C. Hawkins and F. S. Senn, and the Court having heard the evidence and arguments of counsel, and the Court

having made its Findings of Fact and Conclusions of Law,

Now, therefore, it is:

Ordered, Adjudged and Decreed, that these causes be and they are hereby dismissed with prejudice and that the defendant have and recover his costs and disbursements herein [280] to be taxed in the manner provided by law.

Done this 27th day of May, 1946.

SAM M. DRIVER,
District Judge.

Presented by:

NAT. U. BROWN,
One of the Attorneys for Defendant.

O. K. as to form:

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Plaintiffs.

[Endorsed]: Filed: May 27, 1946. [281]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Titus Corbett, Martha Woods Corbett, and Lottie Frank, administratrix of the estate of Levi Frank, deceased, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final

judgment entered in these consolidated actions on the 27th day of May, 1946.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Copy of this notice mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, June 20, 1946.

THOMAS GRANGER,
Deputy Clerk.

Filed: June 20, 1946. [282]

[Title of District Court and Cause.]

COST BOND.

Know All Men by These Presents:

That Whereas, lately at a District Court of the United States for the Eastern District of Washington, Southern Division, in consolidated suits pending in said Court between Titus Corbett and Martha Woods Corbett, husband and wife, plaintiffs, against John C. Wilkerson, defendant, and Lottie Frank, Administratrix of the Estate of Levi Frank, deceased, plaintiff, against John C. Wilkerson, defendant, a judgment was rendered in favor of said defendant, and said plaintiffs having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suits, being an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Ap-

peals to be holden at San Francisco, in the State of California. [283]

Now, this is a cost bond, conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, to the extent of not more than $250.00.

TITUS CORBETT and MARTHA WOODS CORBETT
By /s/ J. H. FELTON,
Attorney.

LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased.
By /s/ J. H. FELTON,
Attorney.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By /s/ J. T. PARADISE,
Attorney-in-fact.

Countersigned:
WEISEL INSURANCE AGENCY,
R. O. WEISEL,
Agent, Moscow, Idaho.

Approved this 21st day of June, 1946.
(Seal) A. A. LaFRAMBOISE,
Clerk, United States District Court.

Filed: June 20, 1946. [284]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The United States District Court was in error in deciding for the defendant and in refusing to award damages to the plaintiffs, Titus Corbett and Martha Woods Corbett, for the reason that the evidence and exhibits produced showed negligence as a matter of law on the part of the defendant, which negligence was the cause of damage to Martha Woods Corbett, one of the plaintiffs.

2. The United States District Court was in error in granting judgment to the defendant and refusing to grant a judgment of damages to the plaintiff, Lottie Frank, for the reason that the testimony and evidence produced showed negligence as a matter of law on the part of the defendant, which negligence wrongfully caused the death of Levi Frank, the late husband of Lottie Frank. [285]

3. The United States District Court erred in admitting and excluding evidence, which omissions and excusions can only be pointed out specifically after the preparation of the transcript of evidence.

4. The United States District Court was in error in not granting damages to plaintiffs.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Service accepted and copy received this 20th day of June, 1946.

KENNETH C. HAWKINS,
NAT. U. BROWN,
Attorneys for Appellee.

Filed: June 20, 1946. [286]

[Title of District Court and Cause.]

MOTION

Come now the plaintiffs and appellants and move the Court to make an order to transmit to the Circuit Court of Appeals, Plaintiff's Exhibit A and Defendant's Exhibits No. 2 and No. 3, such exhibits being a map and photographs and not being capable of adequate reproduction.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Copy of this motion mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9, 1946.

A. A. LAFRAMBOISE,
Clerk. [287]

[Title of District Court and Cause.]

ORDER

It is hereby ordered that the application of the appellants to transmit to the United States Circuit Court of Appeals the original Plaintiff's Exhibit A and Defendant's Exhibits No. 2 and No. 3 be, and the same is hereby, granted, and it is ordered that such exhibits be so transmitted.

Done in Open Court this 9th day of July, 1946.

SAM M. DRIVER,
District Judge.

Copy of this order mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9, 1946.

A. A. LaFRAMBOISE,
Clerk.

Filed: July 9, 1946. [288]

[Title of District Court and Cause.]

APPLICATION FOR EXTENSION OF TIME TO PREPARE AND TRANSMIT RECORD ON APPEAL.

Come now the appellants and respectfully move the Court to extend the time for the preparation and transmitting of the record on appeal to the maximum period fixed by Rule 73(g), for the reason that appellants have been informed by Mr.

Neer, the court reporter, that he is unable sooner to prepare the transcript.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Copy of this Application mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9, 1946.

A. A. LaFRAMBOISE,
Clerk.

Filed: July 9, 1946. [289]

[Title of District Court and Cause.]

ORDER

On the motion of the attorneys for the plaintiffs and appellants for an extension of time in which to prepare and transmit the record on appeal, and good cause being shown therefor,

It is hereby ordered that the time to prepare and transmit the record on appeal to the United States Circuit Court of Appeals be, and the same is hereby, extended for a period of fifty days, that is, that the record shall be prepared and transmitted to the Clerk of the Circuit Court of Appeals within ninety days from the date of the first Notice of Appeal.

Dne in Open Court this 9th day of July, 1946.

SAM M. DRIVER,

District Judge.

Copy of this Order mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9th, 1946.

A. A. LaFRAMBOISE,

Clerk.

Filed: July 9, 1946. [290]

[Title of District Court and Cause.]

APPELLANTS DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

To the Clerk of the United States District Court:

Come now the appellants, by their attorneys, J. H. Felton and Bernice Bacharach, and designate the following pleadings, proceedings, and evidence which they wish prepared for transmission to the Circuit Court of Appeals in connection with appeal heretofore filed in this cause:

1. Plaintiff's Complaints.
2. Defendant's Answers.
3. Reporter's Transcript of Evidence.
4. Exhibits and Rejected Exhibits.

5. Findings of Fact and Conclusions of Law.

6. Judgment.

7. Notice of Appeal.

Respectfully submitted,

J. H. FELTON,

BERNICE BACHARACH.

Service accepted and copy received of Appellants' Designation of Contents of Record of Appeal.

Dated June 20, 1946.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Defendants.

Filed: June 20, 1946. [291]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered 1 to 292, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled

cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, as the same remains on file and of record in my office, and that the same constitutes the record on appeal of the Appellants, Titus Corbett and Martha Woods Corbett and Lottie Frank, Administratrix of the Estate of Levi Frank, deceased, from the Judgment of the District Court of the United States for the Eastern District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of $31.20, and that the same has been paid in full by J. H. Felton, of attorneys for Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 25th day of July, 1946.

(Seal) /s/ A. A. LaFRAMBOISE,

Clerk of said District Court.

[Endorsed]: No. 11400. United States Circuit Court of Appeals for the Ninth Circuit. Titus Corbett, Martha Woods Corbett and Lottie Frank, Administratrix of the Estate of Levi Frank, Deceased, Appellants, vs. John C. Wilkerson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed: August 2, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

Case No. 11400.

TITUS CORBETT and MARTHA WOODS CORBETT, husband and wife,

Appellants,

vs.

JOHN C. WILKERSON,

Appellee,

and

LOTTIE FRANK, Administratrix of the Estate of Levi Frank, deceased,

Appellant,

vs.

JOHN C. WILKERSON,

Appellee.

ADOPTION OF POINTS ON APPEAL

Come now the appellants and adopt the points on appeal in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as error all such matters and all adverse rulings in the admission, exclusion and refusal of evidence.

/s/ J. H. FELTON,
/s/ BERNICE BACHARACH,
Attorneys for Appellants.

Copy mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Appellee, September 5, 1946.

/s/ J. H. FELTON,
Attorney for Appellants.

No. 11400

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,

Appellants,

vs.

JOHN C. WILKERSON,

Appellee.

Brief of Appellants

On Appeal from the District Court of the United States for the Eastern District of Washington Southern Division

---

J. H. FELTON
Residence: Moscow, Idaho

BERNICE BACHARACH
Residence: Wenatchee, Washington
Attorneys for Appellants

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,

Appellants,

vs.

JOHN C. WILKERSON,

Appellee.

Brief of Appellants

On Appeal from the District Court of the United States for the Eastern District of Washington Southern Division

J. H. FELTON
Residence: Moscow, Idaho

BERNICE BACHARACH
Residence: Wenatchee, Washington
Attorneys for Appellants

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No. 11400

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,

Appellants,

vs.

JOHN C. WILKERSON,

Appellee.

Brief of Appellants

Jurisdiction

These actions were commenced in the District Court of the United States for the Eastern District of Washington, Southern Division (R. 2).

Lottie Frank, as administratrix of the estate of Levi Frank, deceased, brought her action against the defendant, John C. Wilkerson, for the wrongful death (R. 3-4) of her husband, Levi Frank.

Martha Woods Corbett brought her action against John C. Wilkerson for injuries by reason of the same automobile accident (R. 2-3). Upon the trial of the case, Titus Corbett, the husband of Martha Woods Corbett, was added as a party plaintiff.

Jurisdiction is founded upon diversity of citizenship, the plaintiffs being citizens and residents of the State of Idaho, and the defendant being a citizen and resident of the State of Washington. The amount in controversy is more than three thousand dollars (R. 234).

The two causes arising out of the same accident, such cases were consolidated for trial and tried before the Honorable Sam M. Driver, Judge of such United States District Court, at Yakima, on May 8 and 9, 1946 (R. 9-10), very shortly after his appointment to such position. At the conclusion of the trial, the court entered findings of fact and conclusions of law favorable to the defendant (R. 233 to 235) and entered judgment thereon (R. 236-237).

Notice of appeal was filed by all plaintiffs on the 27th day of May, 1946 (R. 237-238). The record on appeal was certified by the Clerk of the District Court on the 25th day of July, 1946 (R. 246). The jurisdiction of this court is invoked under Sec. 128 of the Judicial Code as amended, 28 U. S. C. A., Sec. 225 (a).

Statement Of The Case

On the morning of September 9, 1945, about 1 o'clock A. M., Titus Corbett, Martha Woods Corbett, Levi Frank, Roy Whitaker, Jane White, and Rachel Wilson, were proceeding westward by automobile on the north shore of the Columbia River approximately 28 miles west of Goldendale, Washington, returning by way of The Dalles, Oregon, to Celilo, Oregon, where they have fishing rights as Nez Perce Indians.

The driver parked the car on a turn-out, and the ladies went east of the car and out of sight for the purpose of attending to the duties of nature. When the ladies were returning to the car, they joined Levi Frank, who apart from the ladies had also taken advantage of the stop.

John C. Wilkerson, the appellee, and his party, consisting of his wife, Mr. and Mrs. Chittester, and Mr. and Mrs. Monahan (R. 176-177), who had spent the evening at The Dalles in night clubs and having "quite a few drinks," (R. 209), came up the highway proceeding eastward, returning to their home at Wishram, and ran into these people, killing Levi Frank, and severely injuring Martha Woods Corbett.

The stories as to how the accident occurred differ. Appellee and his witnesses say that Levi Frank, Martha

Woods Corbett, and the other one or two (R. 196-216-218-220) (the stories differ) were within three feet of the center line of the highway when struck by the automobile. Appellee said he was blinded by the light or lights of a standing car but proceeded at highway speed (40 to 45 miles per hour), maybe slackening five miles per hour, until he was so close that he could not stop (R. 204-205). He then turned his car to the left into these people, killing one and injuring the others. The damage to the automobile shows they were struck by the right front fender (R. 212). The blinding lights on the standing automobile could only have been those of the appellee's witness, Merrill. The car in which appellants' people and witnesses had been riding was parked some distance from the accident and off the road.

The appellants' witnesses say that they were walking westward single file on the south shoulder of the highway and that appellee's car swerved on to the shoulder and ran into them (R. 58-59), killing Levi Frank and injuring the other three.

The body of Levi Frank and the person of Martha Woods Corbett were both thrown beyond the shoulder and into the ditch on the south side of the highway (R. 59).

The road at this point was straight (R. 12-13); the

weather was clear and dry (R. 12). The crown of the road was black top. The width of the black top was 19 feet 6 inches. The shoulder on the road was gravel and dirt and three feet wide. There was a center line in the highway. (R. 12). In the direction from which the appellee approached the scene of the accident, he had a clear view from a distance of 272 feet (R. 15). At the scene of the accident there were skid marks of appellee's car, beginning close to the south shoulder and continuing across the highway to the north. The length of such skid marks was 63 feet (R. 14). Appellee was driving his own car. There were three people in the front seat and three in the rear. The court, in deciding the case, based his decision upon whether or not the deceased and injured person were on the shoulder of the road or on the pavement. His decision was based upon the statement of Gordon E. Hyland, "I saw no indication of any vehicle travel on the shoulder of the road." (R. 105). Mr. Hyland had also testified that a truck and tractor and other vehicles had been on the shoulder of the road (R. 18), and Titus Corbett, a witness for the appellants, had testified that a large number of people had walked over the shoulder of the road before Mr. Hyland arrived at the scene of the accident, and that the person of Martha Woods Corbett was loaded into an ambulance over such shoulder (R. 225-226). It is apparent from the testimony that the usual curious persons who

stop to look at an accident had also been there before Mr. Hyland, the State Patrolman, arrived.

There is no testimony to show that it would have been possible for Mr. Hyland, under conditions existing, to have detected tire marks upon the shoulder even if a vehicle had passed over it.

Questions Presented

1. Whether or not the driver of an automobile may with impunity run into and injure or kill persons standing or walking upon a public highway of the State of Washington unless such persons are upon the shoulder of the highway.

2. Whether or not a pedestrian is guilty of negligence as a matter of law, if he is upon any other portion of a Washington highway than the shoulder thereof.

3. Whether or not there is any substantial and believable evidence to show that the deceased and Martha Woods Corbett were on the travelled portion of the highway at the time of the injury of Martha Woods Corbett and the death of Levi Frank.

4. Whether or not the appellee, John C. Wilkerson, was guilty of negligence as a matter of law, if and when driving while blinded by the lights of another car so that

he could not see and observe the roadway where he was travelling.

Specifications Of Error

I.

The court erred in making Finding of Fact No. 3, as follows:

> "That at the time and place of said accident the defendant John C. Wilkerson was operating his car in a careful and prudent and legal manner and was in no wise negligent." (R. 234),

the evidence showing that the roadway was open for 272 feet, and his own testimony being that he did not slack his speed of 35 or 40 miles an hour more than 5 miles an hour, although he could not see because of being blinded by the lights of a standing car, and that he ran into a party of four people on an open unobstructed highway after he had admitted "quite a few drinks," and when he was out of his lane of traffic (R. 215-135).

II.

The court erred in making Finding of Fact No. 4, as follows:

> "That at the time and place of said accident the decedent Levi Frank and the plaintiff Martha Woods Corbett were guilty of negligence in failing to walk

> upon the extreme left hand side of the highway as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of defendant's car and to step to the left of the paved portion of said highway as required by said section." (R. 235),

there being no evidence in appellants' testimony to show that such persons were on the travelled portion of the road, and the appellee's testimony indicating that such persons were crossing the roadway in such a position as to be unable to step off onto the shoulder.

III.

The court erred in granting judgment for the appellee and in failing to award damages to appellants.

Argument

In presenting our argument, we recognize the rule that in appealing from the finding and decision of a court sitting without a jury, if there is any substantial evidence which can be taken to support the findings and decree, the appellate court is required so to do.

It is our position that if the trial court had not misinterpreted the law it would have found for appellants under such of the evidence as was accepted and acted upon.

Having tried the matter before a court, we should not be placed in a more difficult position than in a trial before a jury.

The decision of the court shows what would have been the instructions to a jury, and we believe such instructions would have been prejudicial and cause for reversal.

We shall, however, follow in our argument the questions presented:

I.

Duty Of Motorist In Washington

> "Whether or not the driver of an automobile may with impunity run into and injure or kill persons standing or walking upon a public highway of the State of Washington unless such persons are upon the shoulder of the highway."

It was the appellee's position, followed by the decision of the court, that the only question presented was whether or not these persons were on the highway or on the shoulder of the highway. It was the appellee's position at the trial of the cause that any pedestrian in the State of Washington who dares upon a public highway farther than the shoulder thereof may be killed or injured by an automobile, and the driver of the automobile is liable under no circumstances. It was the position of the appellee and the Judge of the District Court that it made no difference that

the driver of the automobile was under the influence of intoxicating liquor, that he was driving his automobile not seeing that which he was required to see, that he was driving into lights of a standing car through which he did not see, and that he killed and injured.

The sole law presented was Section 6360-101, Rem. Rev. Stat., in the following words:

> "Pedestrians on any public highway where a sidewalk is provided shall proceed upon such sidewalk. Pedestrians on any public highway where no sidewalk is provided shall proceed on the extreme left-hand side of the roadway and upon meeting an oncoming vehicle shall step to their left and clear of the roadway."

It was the appellants' evidence that the person killed and the person injured were upon the shoulder of the highway. It was appellee's evidence that the person injured and the person killed were within three feet of the center line of the highway. It was appellee's evidence that placed a standing automobile near where the accident occurred, which standing automobile had such blinding lights that appellee was unable to see more than a portion of the highway. It was appellee's evidence that "we had quite a few drinks," (R. 209). Appellee himself testified that he was travelling upwards of 35 or 40 miles per hour (R. 204), that he reduced his speed 5 miles an hour, but did not

reduce it 10 miles an hour (R. 205), that he was blinded by the approaching lights so that "I could see a small part of the highway at that time." (R. 205). The evidence showed that the last obstruction approaching the accident upon the highway was a small rise in the road 272 feet from the scene of the accident. From that point to where appellee ran into and killed Levi Frank and injured Martha Woods Corbett, the road was open and dry, the weather was clear, and there were no obstructions to his view.

In spite of this testimony of driving while blinded, of running into several persons in the middle of the highway, of driving after he had had "quite a few drinks," he was free of negligence and could kill and injure without liability. We submit that such is not the law of Washington or any other state, and that for this reason the finding and decision of the court is wrong and should be reversed.

II.

Rights Of Pedestrian

> "Whether or not a pedestrian is guilty of negligence, as a matter of law, if he is upon any other portion of a Washington highway than the shoulder thereof."

This question is also based entirely upon the Washington Statute 6360-101 Rem. Rev. Stat. The statute seems unique and in no wise deals with the rights of pedestrians

to cross a public highway or to make any lawful use of the same as pedestrians except to proceed on the extreme left-hand side facing oncoming traffic. It was appellee's position and the court's position that such statute entirely did away with all pedestrian rights on the Washington highways except that one.

We believe that a proper statement of the law is that a far greater degree of care is required of a motorist than of a pedestrian.

> Pinello v. Taylor, 17 P. 2d 1039, 128 Cal. App. 508;
> Cleveland v. Petrusich, 3 P. 2d 384, 117 Cal. App. 71;
> De Greek v. Freeman, 291 P. 854, 108 Cal. App. 645.

And certainly a motorist is required to anticipate the presence of pedestrians upon a highway (Coursault v. Schwebel, 5 P. 2d 77, 118 Cal. App. 259), especially near parked automobiles.

We believe that the court's interpretation of the law is not permissible and that the court's finding thereunder, that Levi Frank and Martha Woods Corbett were guilty of contributory negligence, was without basis.

The court's finding, according to his own statement, was based entirely upon the testimony of Mr. Hyland, the State Patrolman (R. 228), the court saying:

> "His testimony was that skid marks started about two feet inside of the paved portion of the highway and that there was no evidence of any travel or that the car had encroached upon the gravel shoulder which was three feet wide."

Mr. Hyland's testimony was that there had been other vehicles upon the shoulder of the highway (R. 18), but his only testimony in relation to vehicle travel upon the shoulder of the highway was:

> "I saw no indication of any vehicle travel on the shoulder of the road." (R. 105).

Appellee's attorney did not attempt to determine from the highway patrolman or any other person whether or not vehicles on that particular kind of a shoulder would leave marks. It was and is appellants' information and argument that they would not. It is a matter of common knowledge that many highway surfaces, including rock and gravel, do not under all conditions show the tire marks of a car unless the wheels are skidded thereon. It is our contention that the appellee drove his car out upon the shoulder of the highway, killing Levi Frank, injuring Martha Woods Corbett, and hitting their companions, and, swerving to the left, applied his brakes as quickly as he felt the impact, starting his skid marks about two feet inside the hard surface of the roadway, and continued across the same for 63 feet; that the body of Levi Frank

and the person of Martha Woods Corbett were thrown into the right-hand ditch eastward from the shoulder of the highway. The body of Levi Frank and the person of Martha Woods Corbett could not have been thrown to such positions from the point farther east where the skid marks crossed the center line of the highway.

III.

Sufficiency Of Evidence

> "Whether or not there is any substantial and believable evidence to show that the deceased and Martha Woods Corbett were on the travelled portion of the highway at the time of the injury of Martha Woods Corbett and the death of Levi Frank."

We find that we have already made some argument in regard to this question. The relation of the positions of the bodies corresponds more acceptably to the beginning of the skid marks than to the point where the skid marks cross the center line of the highway. The shoulder was three feet wide. The travelled portion of the highway was 19 feet 6 inches. Appellants' testimony and evidence was to the effect that they were upon the shoulder of the highway when hit. Appellee's testimony and evidence showed the persons to have been struck within three feet of the center line of the highway the car first swerving partly across the center line of the highway (R. 215-135),

then hitting Levi Frank and killing him, and hitting and severely injuring the person of Martha Woods Corbett.

If we would take appellee's testimony as true, and we do not, it would indicate that had appellee been sober, in control of his senses and acting properly, he could have turned to the right and passed these persons without injuring them. At that point he had six feet of black top and three feet of shoulder to the right of the position where he places the deceased, appellant Martha Woods Corbett, and their companions upon the highway.

The court entirely disregarded the testimony of Dr. Vogt, who testified "that gravel and sand and weeds" (R. 109) were ground into the soft tissues of the foot of Martha Woods Corbett. All of the testimony shows that the surface of the road was hard black top clear of sand, gravel and weeds. The only manner in which sand, gravel, and weeds could have been ground into the soft tissues of that foot through the outer skin, was for the foot to have been run over by a wheel of the automobile on the shoulder of the road.

IV.

Whether Appellee Was Guilty of Negligence As Matter Of Law

> "Whether or not the appellee, John C. Wilkerson, was guilty of negligence, as a matter of law, if and when driving while blinded by the lights of another car so that he could not see and observe the road where he was travelling."

It has long been recognized that a motorist who drives where he cannot see is guilty of negligence. This rule is applicable where he drives heedlessly into blinding lights.

Before one can be excused in the doing of that which constitutes negligence because of diverted attention, there must be some showing of the existence of a fact, condition or circumstance which would ordinarily divert the mind and attention of the vigilant.

> Sanderson v. Chicago, M. & St. Paul Ry. Co., 167 Iowa 90, 149 N. W. 188.

The duty to keep a proper lookout implies the duty to see what is in plain view, and the driver must operate his vehicle with reference to pedestrians and conditions he should see in the exercise of reasonable care.

> Johnson v. Herring, 300 P. 535 (Mont. 1931).

To continue driving a car when blinded by lights of

other cars is negligence in and of itself. The court, in Jaquith v. Worden, 73 Wash. 349 (at page 358), 132 P. 33, aptly elaborated on this question as follows:

> "He (referring to one defendant) said that he was so blinded by the rays of the headlight of the approaching street car that he could not see ahead; that he could not have seen a person, and that he did not see the machine until he struck it; that he was then thrown from his seat, his foot striking the lever, causing the car to increase its speed. Under his own testimony he was guilty of most pronounced negligence. He was proceeding in utter disregard of the presence of other travelers or objects ahead of him. Had he been without eyes or had he closed them, he would have been in no worse position. To proceed at all in the face of those conditions was at his peril."

The court, in Trainor v. Interstate Construction Co., 187 Wash. 146, 60 P. 2d 7, cites the foregoing decision with approval and quotes therefrom.

The same rule is announced in Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027, as follows: Under a statute requiring a person driving an automobile on a public highway to drive it in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, a driver is negligent if, on a dark

night, with a dark roadbed, he continues to travel at 20 or 25 miles an hour after his vision is obscured by the glare of the lights on an approaching car, so that he can see no object in front of him.

It was the testimony of the appellee that he was blinded by a light,

> "Q. Did it blind you, or didn't it?
> "A. It did blind me." (R. 203).

and further

> "Q. And could you see the road when that light blinded you?
> "A. I could see on the shoulder of the road.
> "Q. But you couldn't see the middle of the road while that light was blinding you?
> "A. Well, I could see for a short ways, not a normal distance.
> "Q. How far?
> "A. Well, it was just a short distance past the car.
> "Q. I mean, was it ten or twelve feet?
> "A. Yes, something like that." (R. 203).

He further testified:

> "Well, it was just after I passed the car with a light on that I saw the people in the road, which would be a very short distance." (R. 203).

In other words, the District Judge found that this man

who was driving at least 35 miles per hour (and his own wife testified to a higher rate of speed) where he could not see, after having "quite a few drinks," was operating his car in a careful, prudent and legal manner and was in no wise negligent (R. 234). We submit that such a decision cannot be supported by this court.

V.

Conclusion

In conclusion, appellants respectfully contend that this cause should be reversed and that damages be awarded to appellants.

Respectfully submitted,

J. H. FELTON
Residence and Post Office Address:
Moscow, Idaho

BERNICE BACHARACH
Residence and Post Office Address:
Wenatchee, Washington

No. 11400

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,
Appellants,

vs.

JOHN C. WILKERSON, *Appellee.*

BRIEF OF APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

NAT. U. BROWN
KENNETH C. HAWKINS
BROWN & HAWKINS
Post Office Address:
Box 437
Office Address:
626 Miller Building
Yakima, Washington
Attorneys for Appellee

REPUBLIC PUBLISHING COMPANY, YAKIMA, WASH.

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No. 11400

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,
Appellants,

vs.

JOHN C. WILKERSON, *Appellee.*

BRIEF OF APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

NAT. U. BROWN
KENNETH C. HAWKINS
BROWN & HAWKINS
Post Office Address:
Box 437
Office Address:
626 Miller Building
Yakima, Washington
Attorneys for Appellee

STATEMENT OF CASE

This is a law case tried to the court sitting without a jury which resulted in Findings of Fact, Conclusions of Law and Judgment in favor of the appellee. It is to be noticed that in the Specifications of Error of the Appellants no error is assigned relative to any rulings of the trial court made in the course of trial and the only question therefor is the sufficiency of the evidence to justify the judgment entered. For that reason it becomes the duty of this court to accept the evidence most favorable to the appellee.

Smith vs. Porter, 143 F. 2d, 292.

The trial court was justified, not only by reason of the above rule but also because, of the preponderance of the evidence in this case, to find that the facts concerning the accident were as follows: The Appellee, John C. Wilkerson, and his wife, accompanied by Mr. and Mrs. R. C. Chittester and Mr. and Mrs. Robert Monahan, on the evening of September 8, 1945, had been to The Dalles, Oregon, where they had been out to a small restaurant and dance hall and had been served a supper and had danced for sometime. (R. 195) They crossed the Columbia River by ferry at The Dalles a little after twelve and were driving toward Wishram, Washington, their home. At about one a. m. at a point about twenty-eight miles west of Goldendale in the State of Washington on public highway No. 830, Wilkerson, as he came over the brow of a hill, saw a rather bright light ahead. He was on a slight down-grade and slowed

down a little. (R. 195) The bright light was apparently coming from a car parked on the right side of the road headed south, in other words, facing Mr. Wilkerson. As he got beyond the lights of the parked car he noticed three people near the middle of the road who were rather close together and appeared to be carrying or supporting or holding someone. (R. 195) He immediately turned his car to the left and applied his brakes. He was unable to stop instantly and the persons on the road were struck by the side of the right front fender. (R. 196) It developed that the persons who were struck were Martha Woods Corbett, one of the plaintiffs, who was rather severely injured, and Levi Frank, who was killed by the accident.

Just prior to the time that Wilkerson first saw the people he was traveling well within the legal speed limit on his right side of the road and was in no wise violating any law of the road or any statutes of the State. The court was also entitled to believe that the persons who were struck by the car were close to the center of the road at the time the accident occurred.

While it is true that the occupants of the Appellants' car all testified that the persons struck were on the right shoulder of the road, yet, as pointed out above, the court was entitled to believe otherwise, not only from the evidence of the Appellee and those in his car but from evidence of Robert W. Merrill (R. 125 et seq.) and Gordon E. Hyland (R. 104), state highway patrolman.

The court's opinion (R. 226 et seq.), delivered immediately upon the close of argument, analyzes the testimony as well as

we could and points out why he found that the Appellee was wholly without negligence and that the occupants of the other car were violating the statute law of the state in walking on the paved portion of the highway and failing to step off at the approach of an oncoming car.

THE STATE LAW

The applicable law of the State of Washington, Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington provides as follows:

> "Pedestrians on any public highway where a sidewalk is provided shall proceed upon such sidewalk. Pedestrians on any public highway where no sidewalk is provided shall proceed on the extreme left-hand side of the roadway and upon meeting an on-coming vehicle shall step to their left and clear of the roadway."

This section has been construed by our Supreme Court in the case of *Nylund vs. Johnston*, 19 Wash. 2d., 163.

Even, therefore, were the Appellee guilty of negligence, this violation of the statute law rendered the deceased person and the defendant Corbett guilty of contributory negligence so as to bar their recovery.

FUNCTION OF THIS COURT

This case is one for the application of Rule No. 52 of the Federal Rules of Procedure, 28 U. S. C. A. following Sec. 723C, which provides:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Inasmuch as the decision in this case resolved itself wholly into the determination of the credibility of the witnesses, the findings of the trial court must therefore stand.

There have been numerous decisions involving the application of Rule 52 from every Circuit but we shall confine this brief to calling the court's attention to a few of those from this court.

In *Wingate vs. Bercut, et al,* 146 F. 2d, 725, 728, the court said, with reference to a question of fact passed on by the trial judge:

> "Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, directs that a trial court's findings of fact be accepted unless 'clearly erroneous.' In the instant case the oft-quoted rule stated in *Silver King Coalition Mines Co. vs. Silver King Consol. Min. Co.,* 8 Cir., 204 F. 166, 177, Ann. Cas. 1918B, 571, is applicable: '* * * where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand.' "

In *Hartford Accident & Indemnity Co. vs. Jasper, et al,* 144 F. 2d, 266, 267, this court adhered to the rule saying:

> "Where there is a conflict in the evidence the findings of the trial court are presumptively correct and should not be disturbed unless clearly erroneous. The findings of facts are to be accepted as true and the sufficiency of the evidence

> to sustain the finding remains the only consideration of the appellate court. This court has held that the rule is well settled that an appellate court will not disturb findings of the trial court based on conflicting evidence taken in open court except for clear error."

Earlier, in *Western Union Telegraph Co. vs. Bromberg*, 143 F. 2d 288, 290, where the question as to the weight to be given the trial court's findings was considered, the court therein pointed out that Rule 52 was but a restatement of a well established principle, saying:

> "The rule does not disturb the long followed principle that the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal and that findings of fact of the trial body will not be set aside unless clearly erroneous."

We could continue this brief almost indefinitely with citations of similar authority but will not do so except to point out that among numerous other cases in which this court had had occasion to consider Rule 52 and reached the same conclusion that it has in the cases from which we have quoted are:

Clark Bros. Co. vs. Portex Oil Co., 113 F. 2d, 45.

Occidental Life Ins. Co. vs. Thomas, 107 F. 2d, 876.

Augustine vs. Bowles, 149 F. 2d, 93.

Gates vs. General Casualty Co., 120 F. 2d, 925.

Sapp vs. Gardner, 143 F. 2d, 423.

O'Keith vs. Johnston, 129 F. 2d, 889.

The function of this court, therefore, on appeals of this kind being limited by the rule and this court's own construction of the rule, which is the precise construction placed upon it by the other nine Circuits, an affirmance of this case necessarily follows.

CONCLUSION

The decision of Judge Driver was not only eminently correct but was the only conclusion that any Judge could reach in considering the evidence in this case and therefore should be affirmed.

Respectfully submitted,

NAT. U. BROWN
KENNETH C. HAWKINS
BROWN & HAWKINS

Post Office Address:
Box 437

Office Address:
626 Miller Building
Yakima, Washington

Attorneys for Appellee

No. 11,402

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAUL SAMUEL, WALTER SAMUEL, SAM BROWN and MURRAY SCHUTZ,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

CLOSING BRIEF FOR APPELLANT, MURRAY SCHUTZ.

LEO R. FRIEDMAN,
935 Russ Building, San Francisco 4,
Attorney for Appellant, Murray Schutz.

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CLOSING BRIEF FOR APPELLANT, MURRAY SCHUTZ.

Before answering the specific points argued in appellee's brief, we deem it important to generally discuss the manner in which appellee has briefed its position, calling particular attention to factual inaccuracies, unjustified inferences and important omissions contained therein.

Appellee has predicated its entire position on a false premise; by assuming there was competent proof of a conspiracy it seeks to justify everything that took place in the trial Court on this false assumption, entirely ignoring the fact that the conspiracy had to be established by competent testimony before any of

the acts and declarations of appellant Schutz' co-defendants could be resorted to as evidence against Schutz. Furthermore, appellee has discussed the case as an entity and has failed to consider either the admissibility of evidence or the sufficiency thereof as applicable to Mr. Schutz, irrespective of what probative value such evidence may have as to the other appellants. The guilt or innocence of Mr. Schutz is a matter personal to him and has to be considered separate and apart from the guilt or innocence of the other appellants. (*Kotteakos v. United States,* 328 U. S. 750, 772.)

At the very opening of its brief, appellee sets forth what it has pleased to term "The Scheme" and predicates this scheme on a misstatement of fact by alleging that "Walter Samuel purchased from Murray Schutz, a wholesale liquor dealer, 1850 cases of Old Marshall Straight Rye Whiskey. This sale was financed by the Morris Plan Company and was evidenced by a receipted invoice of the Distiller Distributing Company." The record does not support this statement and appellee has ignored the evidence on this point. The evidence established that the Morris Plan Company paid Schutz for only 1275 cases and no more; that although an invoice for 1850 cases was originally delivered by Schutz, the Morris Plan Company gave him back releases for 575 cases. This matter, with full references to the record, is set forth on pages 102 to 104 of Schutz' Opening Brief. The entire argument of appellee is based on the sale of 1850 cases to Samuel, a thing that never occurred.

Next, appellee contends that "The Scheme" involved the issuing of invoices by Schutz "showing sales by the Distillers Distributing Company to these tavern owners, although the tavern owners had no dealing whatever with the Distillers Distributing Company, or with Schutz personally". Here appellee has entirely overlooked the fact that Schutz understood and believed that the invoices were being issued to those who had made up the pool of original buyers and to those who subsequently placed orders through Saul Samuel. (See Schutz' Opening Brief, pp. 102 to 108.)

Appellee, by ignoring the matter, concedes the fact to be that Schutz never received more than $25.77 per case, no matter what amount the Samuels, Brown or Hoffman received.

Nowhere does appellee contend that Schutz ever had knowledge that the Samuels or Brown were asking or receiving any amount in excess of $25.77 per case for the whiskey or reselling the same, as distinguished from the procuring of original orders from the tavern owners.

GROUNDS FOR REVERSAL URGED BY SCHUTZ THAT REMAIN UNANSWERED BY APPELLEE.

Appellant Schutz has raised many grounds for the reversal of the judgment as to him. Appellee has failed to either answer or comment on the following:

(a) **Error of the Court in admitting in evidence against Schutz Government's Exhibits 8 and 24 and**

the testimony of the witness Jane Coulter relative thereto. (Schutz' Opening Brief, p. 117.)

These exhibits and the testimony related to the payment of the special tax and penalties by Walter Samuel in 1946, for doing a wholesale liquor business in 1943.

The importance of this evidence is stressed on page 35 of appellee's brief wherein it is stated:

> "The appellant Walter Samuel's admission that he carried on the business of a wholesaler is evidenced by his wholesale liquor dealer's tax payment in 1946, two and one-half years after the sales were made (U. S. Exhibits 8 and 24). This tax payment was made for a period covering the dates of the disposition of the Old Marshall Straight Rye Whiskey. **If the record were otherwise bare as to Walter Samuel, this would be a sufficient acknowledgment of his participation in the conspiracy.**"

The foregoing is the identical argument counsel for Schutz told the trial Court would be made by the Government if the exhibits were admitted against Schutz. (See R. 421e and 421h; Schutz' Opening Brief, p. 119.)

True, appellee argues this matter only as bearing on the guilt of Walter Samuel, but the evidence was admitted against Schutz and was used to establish the unlawful acts of Samuel and as evidence against Schutz.

The failure of the Government to answer this point is the best evidence that there is no answer and that

the admission of the exhibits and testimony against Schutz was prejudicial error.

(b) **The Court erred in refusing to give Schutz' Requested Instruction No. 23** (Schutz' Opening Brief, p. 121), to the effect that the conspiracy must be established as to Schutz by evidence independent of that of the acts and declarations of his alleged co-conspirators.

Appellee consistently resorts to the testimony relating to acts and declarations of Brown and Saul Samuel, made out of the presence of Schutz, as being evidence sufficient to establish the conspiracy as to Schutz. Such is not the law. In our opening brief we have cited many cases announcing the foregoing principle. Appellee's failure to comment on this matter justifies the inference that the point could not be answered.

Appellee cites *Sugarman v. United States,* 35 Fed. (2d) 633, as authority for the proposition that the acts and declarations of an alleged co-conspirator in furtherance of the conspiracy are binding upon a co-conspirator, but overlooks the fact that such rule only applies where there is evidence establishing the conspiracy independent of such acts and declarations. (See cases cited and quoted from on pp. 109-110 of our Opening Brief.)

(c) **The Court erred in refusing to give Schutz' Requested Instruction No. 25** (Schutz' Opening Brief, p. 127), to the effect that his guilt or innocence must be determined upon his honest belief of what the facts

and circumstances were in 1943 and not what the evidence at the trial in 1946 established the conditions to be in 1943.

It was for the jury to determine whether Schutz' actions were prompted by an improper and illegal motive or whether he acted innocently and in good faith. This function the jury should have performed under appropriate guidance from the Court. (*Bollenbach v. United States,* 326 U. S. 607.) The refusal of the Court to give this instruction, so necessary to Schutz' defense, is reversible error, and the Government's failure to even attempt to justify such action is tantamount to a confession of error.

(d) **The Court erred in denying Schutz' motion for a Bill of Particulars.** (Schutz' Opening Brief, p. 131.) By this motion appellant sought information as to the exact nature of the conspiracy for which he was on trial. He asked to be informed whether he was charged with conspiracy to sell whiskey above the wholesale ceiling price or the retail ceiling price. He also asked information as to just what the ceiling price was. The record establishes that it was not until the Court actually charged the jury that any one had any information on these points and even then, as hereinafter pointed out in dealing with the Court's instructions as to the ceiling price, it practically stands admitted by the Government that the formula and figure establishing the ceiling price, as given to the jury by the Court, was erroneous.

No man should be placed on trial or allowed to be convicted where he is forced to trial in the dark as to a material and essential element of the charge.

Each of the foregoing matters were of vital importance during the trial and the error appearing in each thereof is sufficient to justify a reversal of appellant's conviction. If the points were not well taken, it would seem that the Government would have had no difficulty in answering them but, by failing to answer these points, the Government's action can be construed in no other light than that it was unable to answer.

INSUFFICIENCY OF THE EVIDENCE TO ESTABLISH THE CHARGE AS TO APPELLANT SCHUTZ.

The Government divides its argument as to the sufficiency of the evidence into two parts, dealing first with the sufficiency of proof as to a conspiracy to violate the tax and basic permit statutes and then as to the sufficiency of the evidence to establish a conspiracy to sell liquor above the ceiling price.

Dealing with the first portion of the argument, the Government states that there were many transactions whereby Saul Samuel and Sam Brown sold liquor in wholesale lots to various tavern owners and that neither of these persons had paid the special tax or procured the basic permits so to do. The evidence

shows that Schutz had paid the special tax and had procured the basic permit, all covering the times involved in the indictment. Schutz' guilt can not be established merely by proving the guilt of the Samuels and Brown, there must be more in the record and, in order to supply this additional evidence, the Government resorts to the following line of reasoning: Thus, on page 35, the Government alleges that these sales were not independent transactions because Samuel and Brown had bought the whiskey from Schutz and again the Government refers to the purchase of 1850 cases. The sale of the whiskey through the Morris Plan Company involved only 1275 cases, and the Government only proved the sale of 670 cases to the tavern owners. Whether these sales were made out of the 1275 cases or out of the 695 cases the title to which remained in Schutz does not appear in the evidence and is not argued in the Government's brief. The evidence at no point establishes that Schutz knew of the activities of Samuel and Brown. Schutz' testimony is that at all times he believed he was selling his own whiskey and that he believed he was issuing invoices to purchasers of whiskey from Schutz. There is nothing in the record to refute this testimony.

The Government alleges that Schutz reported the sales of his 52B records "as sales of the Distillers Distributing Company". If they were in fact sales of the Distillers Distributing Company, then there could be no conspiracy to violate the tax and permit statutes.

On page 37 the Government alleges that the only other explanation of these transactions "which would vest them with a legitimate use of Schutz' license is the theory that Schutz was selling to a group of retailers". The Government then alleges that this hypothesis is inconsistent with Mrs. Theo McNett's testimony as to the conversation had with Schutz and that she stated that she did not have the impression that Schutz had told her that Samuel and others were buying the whiskey. Mrs. McNett's testimony in this regard appears on page 204 of the record and in addition to her stating that she did not have an impression that Schutz had so told him, she testified "but I would not say that he didn't, except that I don't remember of him saying that". It should be remembered that Mrs. McNett had only been an employee of Schutz from August 15, 1943, just 15 days during the month the transactions took place.

The Government points out that Mrs. McNett testified that the billing—the issuance of the invoices—was done by the Distillers Distributing Company because Mr. Samuel could not issue the bills himself and that Schutz had told her he was to issue the invoices because Samuel had a retail store and could not issue the bills himself. Assuming that the testimony of Mrs. McNett is true, it does not establish Schutz' connection with the conspiracy charged. Samuel could not issue any invoices for wholesale lots of liquor and Schutz' assertion in this regard does not establish that Schutz was helping him so to do. Schutz at all times not only believed he was selling but actually

was selling his own liquor and the Government never proved to the contrary.

The Government, on page 37, alleges as follows:

> "The only evidence in the record which supports the group-purchase theory is the self serving assertion of the appellant Schutz himself that Sanders said he thought he could get a group of retailers together to take the entire purchases (Tr. 434). Not only is this flatly denied by Sanders himself (Tr. 592, 593), but it is a wishful hypothesis which finds no comfort in the testimony of Baker, who financed the purchase, Saul Samuel, Sam Brown, or Walter Samuel, the co-appellants, or Theo McNett, Schutz' bookkeeper. Finally, it is refuted by the most convincing of external circumstances; not a single one of the purchasers themselves mentioned anywhere in the testimony in this record any such plan or arrangement."

The foregoing statement does not conform to the record. The jury did not have to believe Sanders' denials. A reading of the testimony given by Sanders together with his activities in the Samuel liquor store, coupled with the pencilled notation of figures, the exemplars written by Sanders and his refusal to deny his making the pencilled computations, would have and possibly did justify the jury in paying no attention to his testimony whatsoever.

The Government alleges that the group-purchase theory finds no support except in Schutz' own testimony and finds no support in the testimony of Baker, the Samuels, Brown, or the tavern owners. The testi-

mony of Brown (R. 506-7 and 518-519) is that they did not have sufficient money to make the entire purchase and went out and procured advance orders for some of the whiskey. Saul Samuel testified that he took orders from his customers for some of the whiskey and that he knew that Mr. Brown was busy getting people to buy it (R. 586-7), and that he knew the money collected from his customers was to be used in paying the invoice price to Mr. Schutz. (R. 586.) The testimony of the tavern owners also inferentially supports the testimony of Mr. Schutz. Francis Duffy testified that he called Saul Samuel and asked if he could get any whiskey and Samuel replied "maybe" and that possibly there would be some whiskey coming through but he did not know for sure. (R. 233.) Emmitt Clay testified that he spoke to Mr. Hoffman and asked him if he could get some whiskey; that Hoffman was working for the wholesaler. (R. 248.) Charles Antonelli testified that in the conversation with Mr. Samuel relative to the whiskey, he was told that Samuel was going to get this liquor. (R. 323.) Lucille Tyler testified that she placed an order for the whiskey with Saul Samuel; that she understood the whiskey was coming from the Distillers Distributing Company and that she was buying it from that company (R. 333); that Samuel said he did not have the liquor himself; that it was available and that he could make arrangements for it. (R. 333.) This testimony shows that the sales being made to these tavern owners were in reality sales to be consummated in the future and the whiskey procured from a source of supply

other than the Samuels, Brown or Hoffman. While none of the tavern owners testified as to being informed that there was a stock of whiskey for the purchase of which the Samuels and Browns were attempting to get a group together, this is readily understandable when we consider that these parties were asking the tavern owners to pay an amount almost double the invoice price. This evidence does establish that, insofar as the purchase from Schutz is concerned, Saul Samuel and Brown were procuring tavern owners to pledge themselves in advance to the purchase of this whiskey and to make out checks to the Distillers Distributing Company for the invoice price thereof.

These were all matters that the jury had a right to consider as corroborative of the testimony of Schutz, a right denied the jury by the refusal of the Court to instruct that Schutz' honest understanding and belief as to such facts constituted a defense.

Next, the Government argues sufficiency of the evidence to support the charge of conspiracy to violate the Emergency Price Control Act. It is a remarkable fact that the Government admits that the alleged ceiling price of $25.77 a case was arrived at by use of the cost-plus-15% formula set forth in MPR 445, although this formula did not become operative until the 31st day of August, 1943, one day after all of the sales had been consummated. Nowhere in the record is there any proof of what this whiskey could legally be sold for in wholesale lots prior to August 31, 1943. The fact that Schutz, in fixing the price at which he

would sell the liquor, may have used the formula that was not to become operative until August 31st, does not establish at what price the liquor could lawfully be sold for during the period in question.

It follows that there never was any competent proof of an essential element of this portion of the charge. It can not be assumed that the price of $48.00 or $55.00 a case was in excess of the price established by law, which price was a matter that depended upon physical facts and figures, which may have varied in each particular case and had to be established by competent evidence. Later in this brief, in dealing with the Court's instructions, we will demonstrate that the formula relied on by the Government and as given to the jury by the Court was erroneous.

The Government points out that Samuel and Brown were receiving monies greatly in excess of the price at which Schutz was selling the whiskey but there is no testimony in the record that Schutz knew of this fact or was aiding and abetting the parties so to do. The only evidence in the record is that Schutz received the price he had fixed for the whiskey—$25.77 a case.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE CEILING PRICE.

The trial Court instructed the jury that the maximum selling price of the whiskey was the net cost to the wholesaler plus a 15% mark up (R. 667), and

adopted such formula from MPR 445. This is admitted by the Government on page 44 of its brief where the contentions of both parties are set forth as follows:

> "Maximum Price Regulation No. 445, 8 Fed. Reg. 11161, established a formula of cost plus 15% for the maximum price for a sale at wholesale of distilled spirits. The court instructed in accord with this regulation (Tr. 667). All the elements to establish the price were in evidence, the cost, the freight, and the tax (Tr. 471-473). * * * Appellants do not contend that no ceiling applied to the Old Marshall Straight Rye Whiskey, but only that the formula set forth in *Maximum Price Regulation 445* was not yet in effect at the time of the sales."

There was no other evidence in the record on which any maximum price could be figured or determined. If, as contended for by appellant and shown by the OPA Regulations, such formula was not in operation and not the proper one to be applied, **there was no evidence at all as to the maximum price for which the whiskey could be sold.**

We set forth in the appendix hereto the various OPA Regulations dealing with the subject in chronological order.

Under the express provisions of MPR 445, the provisions relative to the maximum prices at which wholesalers could sell distilled spirits did not become effective until August 31, 1943 and until that date the

provisions of MPR 193 and of the GMPR remained in full force and effect.

Neither MPR 193 nor the GMPR provided for any such formula fixing the maximum price for the sale of whiskey in wholesale lots.

Neither the appellant Schutz, nor Walter Samuel, was engaged as a wholesaler of whiskey during March, 1942.

MPR 193 expressly provides that the seller's maximum price for distilled spirits "shall be the seller's maximum price established under § 1499.2(a) of the General Maximum Price Regulation", plus certain additions and further provides that if the seller's maximum price can not be determined under paragraph (a), then his price shall be that established under paragraph (a) for the most closely competitive seller of the same class for such domestic distilled spirits or for a similar commodity most nearly like it.

The GMPR provided that the maximum price shall be either (a) the highest price charged by the seller during March, 1942, for the same commodity or for the similar commodity most nearly like it or (b) if the seller's maximum price could not be determined as aforesaid, then the highest price charged during March, 1942 by the most closely competitive seller of the same class for the same commodity.

It follows from the foregoing that, as all the sales were made prior to August 31, 1943 (despite the

government's contention to the contrary), we are thrown back to the General Maximum Price Regulation for the fixing of the ceiling price and this ceiling price could only be the highest price charged during March, 1942 by the most closely competitive seller of the same class for the same or a similar commodity. **There was absolutely no evidence establishing this latter factor. Therefore there was no evidence in the case establishing the ceiling price. This constituted a fatal failure of proof on the part of the government and rendered the instruction given by the Court erroneous and reversible error.**

The government relies on the decision of this Court in *Martini v. Porter,* 157 F. (2d) 35, but this case is in reality an authority for appellant. Thus on page 47, this Court says:

> "The sales herein were made during July and August, 1943. The General Maximum Price Regulation controls these sales. There are four sections under the GMPR providing methods for ascertaining maximum prices."

The foregoing language of this Court should dispose of this entire question. As MPR 445 did not apply, then the instruction given by the Court to the jury undoubtedly was erroneous.

In the *Martini* case, there had been an order made by the OPA fixing the ceiling price and the liquor involved was of such a character, as the evidence showed, that a maximum selling price could not be arrived at under the General Maximum Price Regu-

lation, except by an order made by the Price Administrator under section 1499.3(c). The order made by the Price Administrator recited "neither applicants nor any competitor sold the same or similar whiskey during March, 1942." The *Martini* case presents a situation totally at variance with the case at bar. The government offered no proof that the Marshall Whiskey or a similar commodity was not sold during March of 1942 and there was no proof offered that the price had been fixed under authorization of an order made by the Price Administrator. All presumptions are in favor of innocence and it can not be presumed that the maximum price could not be fixed under section 1499.2 of the GMPR.

Lastly, the government seeks to uphold the formula and the sufficiency of the evidence to establish the ceiling price by asserting that there was one sale made after August 30, 1942, viz.: the second sale to Picchi, and refers to pages 285 and 286 of the record. A reference to this testimony shows that Picchi states he made two purchases of the whiskey, the second one being "a month or so" after the first sale. The government assumes that the second sale took place a month or so after the issuance of a check by Picchi, payable to the Distributing Company for $644.25. In this the government is in error. The testimony of Mr. Picchi (R. 283) shows that he made two purchases, that the first purchase was all in cash (R. 284) and that the second purchase was made by a check payable to the Distributing Company. (R. 284.) The check, Government's Exhibit 34, was payable to the

Distillers Distributing Company and is dated August 23, 1943, and the invoice for such sale is stamped paid as of August 27, 1943. (R. 281.)

Mr. Parr, the accountant who kept Picchi's books, testified that the books showed both the cash and check payments to have been made in August of 1943. (R. 268-9, 288-9.) **Picchi's books were admitted in evidence** (U. S. Exhibit 37) **and show both payments made on August 23rd.**

It follows that the government's attempt to uphold the erroneous instruction, on the theory that one sale took place after August 30th, is without support in the record and this attempt on the part of the government demonstrates the error not only in the Court's instructions but in the very theory on which the government presented its case.

The record is replete with numerous sales having been made to various tavern owners. Does the government contend that the charge in the indictment can be supported by the proof of one sale made after August 30th? If so, it was error to admit evidence of all the other sales over the objection of appellant Schutz, but, as pointed out above, no sales were made after August 30th and there was a total failure of proof as to any violation of law in that there was no evidence establishing the maximum price beyond which the liquor could not be sold.

UPON THE RECORD, THE GOVERNMENT'S ATTEMPT TO RELY UPON PROOF OF A CONSPIRACY TO DO ANY ONE OF THE THREE THINGS CHARGED IN THE INDICTMENT CAN NOT BE SUSTAINED.

The indictment sets forth a conspiracy to violate three laws of the United States. The government contends that "even should this court find an insufficiency of proof as to one of the purposes of the conspiracy as charged, it would properly affirm the judgment below, provided that a conspiracy to commit one of these offenses was proved".

The Court charged the jury, in substance, that in order to return a verdict of guilty, it was not necessary that the jury find that the conspiracy was to violate all three such laws of the United States but, if they all agreed that the defendants had conspired to violate one of these three laws of the United States, then they could bring in a verdict of guilty. This was a correct statement of the law but how can this or any other Court determine which of the three offenses charged the jury determined the defendant Schutz to have been guilty of committing.

The entire record is devoted almost exclusively to proof of sales by Samuel, Hoffman and Brown. Eliminate this testimony from the record and there is nothing left on which to base a conviction.

Here we have but a single count in an indictment charging a conspiracy to violate three laws of the United States and this Court can not guess as to whether the jury found the defendants guilty of all three violations or as to which of the three the jury agreed upon.

It has been held, as announced in the cases cited on page 40 of the Government's Brief, that an indictment can charge a conspiracy to violate two or more laws of the United States and the judgment will be sufficient if the evidence establishes a conspiracy to violate one of such laws. However, this general rule is only applicable where pertinent and proper motions have not been made in the trial Court prior to the submission of the cause to the jury. In other words, where one of the alleged objects of the conspiracy was to violate a particular law and the proof did not support such charge, then, **if a defendant moves the Court to withdraw such charge from the jury and the motion is denied, the judgment can only be sustained if the evidence shows the conspiracy was to commit all of the crimes charged in the indictment.**

At the conclusion of the government's case appellant Schutz moved the Court to withdraw from the jury that portion of the indictment dealing with the conspiracy to violate the maximum price on the ground that the evidence was wholly insufficient to support or establish that portion of the charge. (R. 643-644.) The Court denied this motion.

In *U. S. v. Smith* (CCA-2), 112 Fed. (2d) 83, 86, the law in this regard is stated as follows:

> "Clearly there was sufficient proof for the jury to convict on the charge of conspiracy to commit the first two offenses. It is elementary that the jury needed to find a conspiracy to commit only one of the four offenses, in order to convict. But appellant was entitled to insist that if there was not sufficient proof of a conspiracy to commit any

one of the four offenses, the jury should be instructed to disregard that offense, and consider only a conspiracy to commit the other three. Appellant asked the court to take the issue of a conspiracy to commit the third office (transporting a woman for immoral purposes) away from the jury, and the court did so. Appellant neglected to request that the jury be similarly instructed to disregard the fourth offense (failing to register), but she now claims this part of the case should never have been submitted to the jury. Whether a conspiracy to commit that offense was shown under the circumstances here disclosed is a matter we need not now decide. Appellant's failure to request an instruction as to this offense was fatal."

In *United States v. Groves* (CCA-2), 122 Fed. (2d) 87, certiorari denied 314 U. S. 670, the Court reversed a conviction against one of the alleged co-conspirators and in doing so rendered the following decision:

"The case against Groves, however, stands on an entirely different footing. There was a general showing of his blood and business relationship with Wallace Groves and of his co-operation with Wallace Groves and Warriner in setting up the corporations which were later used for criminal purposes. In addition, there is more direct evidence of his participation in the Devendorf stock deal, in that some of his corporations took some of Devendorf's stock at Wallace Groves' request, and resold it for him to G.I.C. But there was no further evidence at all of his connection with the procurement of the two fraudulent commissions, and under the circumstances we feel that a jury

> would not be justified in finding that he participated in either of them. But if it could not find that he participated in both, his conviction must be reversed; for it was allowed, over objection, to consider together his guilt in respect of each of the three frauds alleged, and hence each must be proven. United States v. Smith, 2 Cir., 112 F. (2d) 83. See United States v. Koch, 2 Cir., 113 F. (2d) 982, 984."

In the instant case appellant Schutz fully protected his rights. The Court submitted the entire charges contained in the indictment to the jury which returned a general verdict of guilty. No one can say what prompted this action of the jurors or whether they did not proceed solely on the theory that Schutz was involved in a conspiracy to sell liquor above the ceiling price. As the evidence relating to this portion of the indictment consumes about ninety percent of the government's case, the prejudicial effect of submitting this phase of the matter to the jury should be manifest.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE LAW OF CIRCUMSTANTIAL EVIDENCE.

In our opening brief, page 123, we argued at length the error in the Court's instruction as to circumstantial evidence. This was a matter vital to appellant Schutz and he was entitled to have the jury correctly instructed in such regard. It must be remembered that none of the purchasers of the liquor dealt with Schutz at all and both the conspiracy and Schutz'

connection therewith had to be established by circumstantial evidence.

The government devotes but a paragraph to this erroneous instruction and comments on our argument as follows:

> "This argument is a study in hairsplitting semantics. A 'rational conclusion' can have no other meaning for the jury than the result of a 'reasonable hypothesis'. This is like defining the proper destination as one which is led to by the correct path, or the correct path as one which leads to the proper destination. The words are in either example two sides of the same shield. The instruction surely passes the ultimate test of its common sense meaning to the jury."

The inability of the attorneys for the government to distinguish between a "rational conclusion" and a "reasonable hypothesis" is regrettable but can not change the law. If our argument "is a study in hairsplitting semantics", then we are not alone in such hairsplitting, because that is exactly what this Court did in *Paddock v. United States,* 79 F. (2d) 872.

CONCLUSION.

The trial of the case as to Murray Schutz was replete with error. Not only was the evidence wholly insufficient to support the charge contained in the indictment, but his guilt or innocence was allowed to be passed on by the jury without the giving of proper instructions for the determination of this question

and under erroneous instructions of the Court and upon incompetent evidence admitted over Schutz' objection. The judgment as to Murray Schutz should be reversed.

Dated, San Francisco,
August 8, 1947.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant,
Murray Schutz.

(Appendix Follows.)

Appendix.

Appendix

GENERAL MAXIMUM PRICE REGULATION.

This was the first regulation and was issued on April 28, 1942 and filed in the Federal Register on April 30, 1942. Pertinent provisions of this Regulation are as follows:

"§ 1499.2. *Maximum Prices for Commodities and Services. General Provisions.* Except as otherwise provided in this Regulation the sellers' maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March, 1942:

(1) For the same commodity or service: or

(2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or

(b) If the sellers' maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942, by the most 'closely competitive seller of the same class':

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it."

MAXIMUM PRICE REGULATION 193.

On August 1, 1942, *Maximum Price Regulation 193* (7 Fed. Reg. 6006) was issued. The pertinent provisions of this Regulation are as follows:

"§ 1420.1 *Maximum prices for domestic distilled spirits.* On and after August 5, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver domestic distilled spirits and no person in the course of trade or business shall buy or receive domestic distilled spirits at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1420.13; and no person shall agree, offer, solicit, or attempt to do any of the foregoing.

§ 1420.13 *Appendix A: Maximum prices for domestic distilled spirits—(a) Determination of maximum prices generally.* The seller's maximum price for domestic distilled spirits shall be the seller's maximum price established under § 1499.2 (a) of the General Maximum Price Regulation, plus the following additions:

(1) *Manufacturers may add:* * * *

(2) *Sellers, other than manufacturers, may add:* * * *

(b) *Determination of maximum prices by reference to maximum prices of most closely competitive seller.* If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) of this section, the seller's maximum price for such domestic distilled spirits shall be the maximum price established under paragraph (a) of this section for the most closely competitive seller of the same class for such domestic distilled spirits or for the similar commodity most nearly like it (as such term is defined in § 1499.2 of the General Maximum Price Regulation) for sales to a purchaser of the same class."

MAXIMUM PRICE REGULATION 445.

On August 9, 1943 *Maximum Price Regulation 445* (8 Fed. Reg. 11161) was issued. Pertinent provisions are as follows:

"Article V—Maximum prices for sales of packaged distilled spirits and packaged wine by wholesalers, retailers, monopoly states, and primary distributing agents.

SEC. 5.1 *Purposes of Article V*—(a) *Generally.* Article V establishes maximum prices for sales of packaged (but not bulk) distilled spirits and wine by the following persons:

(1) Wholesalers, as defined in Section 7.12; (2) Retailers, as defined in Section 7.12; (3) Monopoly states, as defined in section 7.12 and (4) Primary distributing agents, as defined in section 7.12.

* * * * * * *

(c) *Prior regulations, orders and interpretations superseded.* Except as otherwise provided in this regulation, Article V supersedes all other maximum price regulations, orders and interpretations issued by the Office of Price Administration before August 14, 1943, with respect to sales of packaged imported and domestic distilled spirits or wine by any wholesaler, retailer, monopoly state or primary distributing agent, including the applicable provisions of the following:

(1) The General Maximum Price Regulation;

(2) Maximum Price Regulation No. 193, as amended;

(3) Orders Nos. 1 through 5 inclusive under Maximum Price Regulation No. 193;

(4) Article II of Revised Supplementary Regulation No. 14;

(5) Section 2.3 (b) of § 1499.26 of Revised Supplementary Regulation No. 1;

Provided, That such maximum price regulations, orders and interpretations shall remain in effect with respect to a particular sale of packaged distilled spirits or wine by any such person until provisions of this Article become applicable thereto.

SEC. 5.3 *Determination of 'net cost' used in figuring maximum prices for wholesalers, retailers and monopoly states—*

(Here follows the cost-plus-15% formula.)

Sec. 5.10 Dates on which this article shall apply. This Article, except as otherwise provided, shall apply to all sales or offers to sell of packaged imported or domestic distilled spirits or wine made by a wholesaler, retailer, monopoly state, or primary distributing agent on or after August 31, 1943; * * *"

No. 11,402

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAUL SAMUEL, WALTER SAMUEL, SAM BROWN and MURRAY SCHUTZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
REYNOLD H. COLVIN,
Assistant United States Attorney,
Post Office Building, San Francisco, California
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,402

IN THE

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Appellants,

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SUPPLEMENTAL BRIEF FOR APPELLEE.

Pursuant to the order of this Court of September 19, 1947, setting aside the prior submission of this cause, and in accord with the permission therein contained to file supplemental briefs, the appellee will further consider two questions:

1. Whether the instruction given the jury by the trial Court on the subject of circumstantial evidence constitutes reversible error; and

2. Whether the instruction given the jury upon the subject of price regulation constitutes reversible error.

I.

PROPER INSTRUCTIONS WERE GIVEN ON THE SUBJECT OF CIRCUMSTANTIAL EVIDENCE.

In the Court below the appellant Schutz requested the following instruction, set forth at page 31 of the transcript:

> "Defendant Schutz's Requested Instruction No. 5.
>
> Subject:
>
> Circumstantial Evidence—Two Hypotheses.
>
> In a case where the prosecution seeks to establish a crime against a defendant by circumstantial evidence, such evidence must be not only consistent with the hypothesis of guilt but inconsistent with any other rational hypothesis. Therefore, if you find in this case that the circumstantial evidence relied upon by the Government leads to two opposing and rational conclusions, one that the defendant Murray Schutz is guilty and the other that he is not guilty, it is your duty to adopt the conclusions that such defendant is not guilty and return a verdict finding the defendant Murray Schutz not guilty."

This instruction was requested on behalf of the other appellants by a reference to the appellant Schutz's proposed instruction. (Tr. 52.) The Court in the course of its instructions (Tr. 656-677, and 683) gave the following charge upon this subject, included at page 672 of the transcript:

> "Now, the evidence in proof of the conspiracy may be circumstantial. Where circumstantial

evidence is relied upon to establish a conspiracy, or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants, or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly."

The appellant Schutz contends at page 3 of his Supplemental Brief:

> "* * * the main error was in the use of the phrase 'inconsistent with any other *rational conclusion'*, instead of the correct phrase 'inconsistent with every *reasonable hypothesis of innocence'*."

The record does not show that counsel called this claimed error to the attention of the Court below. *Rule 30 of the Federal Rules of Criminal Procedure* provides the opportunity for such objections to be made:

"Rule 30.

Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably di-

> rects, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

And it is to be noted that the Court followed this rule in allowing counsel to call any purported errors to its attention. The record contains numerous specific objections (Tr. 667-683), but at no point in that proceeding did any of counsel complain that the given words, "inconsistent with any other rational conclusion" had been given in place of the requested language, "inconsistent with any other rational hypothesis".

In Appellee's Brief, at page 46, we argued, and it is our present position, that the proposition that there is a prejudicial distinction between the request and the charge is without merit. As we there stated:

> "This argument is a study in hairsplitting semantics. A 'rational conclusion' can have no other meaning for the jury than the result of a 'reasonable hypothesis'. This is like defining the

> proper destination as one which is led to by the correct path, or the correct path as one which leads to the proper destination. The words are in either example two sides of the same shield. The instruction surely passes the ultimate test of its common sense meaning to the jury."

The requested instruction on circumstantial evidence by the appellants themselves demonstrates the interchangeable usage of these words. In that request, set forth above, the language shifts almost unnoticed and synonymously from "rational hypothesis" to "rational conclusions."

The appellants rely upon *Paddock v. United States* (C.C.A. 9), 79 F. (2d) 872, insofar as this point is concerned. The instruction in that case, however, is distinguishable from the one before this Court. There the pertinent part of the instruction, set forth at page 874 of the opinion, reads:

> "Evidence about circumstances, but this is the same with all circumstances, must at all times be consistent with guilt only and inconsistent with innocence, but since you are required to believe the defendant guilty beyond a reasonable doubt, it, so far as I can see, makes little difference what form of evidence you are relying upon."

At page 876 of the Paddock opinion, the Court commented:

> "We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable

> doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon', as stated by the trial judge. The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

It is obvious from this comment that the Court did not pass upon, or even consider, the use of the word "conclusion" instead of "hypothesis." The *Paddock* case was concerned with an instruction which told the jury to choose between the alternatives of innocence and guilt. The instruction failed to show in the language of the opinion, "the doctrine of reasonable doubt as applied to circumstantial evidence." It is, of course, a well settled rule of law that instructions are to be construed as a whole; and this doctrine further explains the contrast between the *Paddock* case and the present case. In the *Paddock* case, where the Court held that the doctrine of reasonable doubt was not applied to the rule of circumstantial evidence, the lower Court had erroneously instructed on that very doctrine of reasonable doubt. In this case, as contrasted to the *Paddock* case, there was neither a defective instruction on reasonable doubt, nor a parallel instruction on circumstantial evidence. Whatever

may be the merit of the *Paddock* case, it is no authority on its record for the reversal of this cause.

In the present case the instructions of the Court upon the doctrine of the application of reasonable doubt to circumstantial evidence as a basis for conviction was satisfied by the use of the language: "* * * but such circumstantial evidence must be inconsistent with any other rational conclusion."

It should be further noted that historically courts have used the words "reasonable conclusion" or "rational conclusion" in this same instruction in place of "reasonable hypothesis" or "rational hypothesis". *Garst v. United States* (C.C.A. 4) 180 F. 339. The very phrase used by the Court below, "inconsistent with any other rational conclusion," was approved by this Circuit Court in *Shepard v. United States* (C. C. A. 9) 236 F. 73. There is no prescribed formula for charging a jury upon circumstantial evidence, nor is it necessary that the Court employ any particular words or phrases so long as the instruction correctly states the rule so as to be understood by the jury. Although "hypothesis" is the most commonly used word in this connection, synonyms thereof may be substituted. Thus, it was held not error to employ the word "conclusion."

State v. Willingham, 33 La. Ann. 537, 89 A.L.R. 1380-1381.

See also:

People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

The appellants, in response to an inquiry of this Court at the earlier hearing of this case, have discussed the decisions of Judge Learned Hand of the Second Circuit Court of Appeals holding that where the trial Court charges correctly on the doctrine of burden of proof, presumption of innocence, and upon the rule of reasonable doubt, no charge need be given on the question of circumstantial evidence.

Becher v. United States (C.C.A. 2), 5 F. (2d) 45;

United States v. Becker (C.C.A. 2), 62 F. (2d) 1007;

United States v. Arrow Packing Corp. (C.C.A. 2), 153 F. (2d) 669.

In the present case we need not extend the argument to the position of the Second Circuit. The jury was here properly instructed upon the subject of circumstantial evidence as well as the doctrine of reasonable doubt. In view of the full and ample protection given these appellants the only question raised by the line of cases decided by Judge Hand is an academic one: Whether in this case the appellants were not given more favorable instructions than the law requires.

II.

THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE CEILING PRICE.

Maximum Price Regulation No. 445, 8 Fed. Reg. 11161, established a formula of cost plus 15% for the maximum price for a sale at wholesale of distilled spirits. The Court instructed in accord with this regulation (Tr. 667). All of the elements to establish the price were in evidence, the cost, the freight, and the tax (Tr. 471-473). The tax provision is further a matter of State law (Appellee's Brief, Appendix, p. viii). Appellants do not contend that no ceiling applied to the Old Marshall Straight Rye Whiskey, but only that the formula set forth in *Maximum Price Regulation 445* was not yet in effect at the time of the sales.

The trial Court applied the case of *Martini v. Porter* (C.C.A. 9), 157 F. (2d) 35, to the effect that the formula set up in *Maximum Price Regulation 445* may be used to determine whether there were violations of ceiling prices under the General Maximum Price Regulation. In this we agree.

However, there is further support for the use of this formula. The brief of the appellants Samuel and Brown is clearly misleading and inaccurate. At page 37, it states:

> "The formula which the jury was given was admittedly based on M.P.R. 445 (9 F.R. 4687). Section 5.10 of that regulation (later changed to Section 5.11) expressly states that the article of that regulation pertaining to maximum prices

> for wholesalers, the article containing the formula used in this case, 'shall apply to all sales * * * on and after August 30, 1943.' The transactions in this case took place around the first part or middle of August."

The fact is that the second sale to Picchi by the appellant Saul Samuel took place after August 30, 1943, and within the effective date of the regulation itself (Tr. 285, 286). This is corroborated by Schutz's 52-B form (U.S. Exhibit 5) showing a delivery to Picchi on September 18, 1943. It is obvious that the Court properly instructed the jury, and the only question that can be raised by the appellants is whether there should have been a distinction drawn by the Court as to the earlier and the later sales.

We submit that there was clear evidence of the intent to violate on the part of the appellants. This must be measured by their own use of invoices corresponding to the formula ceiling price and the collection of the side money in cash. The entire record indicates no prejudice to them because of the Court's instructions. Were they, however, to show any lack of perfection with regard to the instructions on these regulations, it would seem that the proof of the tax and permit features of this case in all their overwhelming force would deprive them of a showing of such prejudice.

If there were any irregularity in the trial Court's instruction upon the O.P.A. phase of this case, we should then be faced with this question: *Where de-*

fendants are charged with a conspiracy to violate several laws of the United States and the Court erroneously instructs upon one of these laws, should a general verdict of "guilty" be reversed?

There is a persuasive line of authority supporting the contention that the conviction be upheld. The rule is well settled that where an indictment charges a conspiracy to violate several laws of the United States and the proof as to one of these objects is insufficient, the conviction will be upheld upon a general verdict of guilty, provided that proof as to any of the objects is sufficient.

Kepl v. United States (C.C.A. 9), 299 F. 590; cert. den. 266 U.S. 617;

McDonnell v. United States (C.C.A. 1), 19 F. (2d) 801;

McWhorter v. United States (C.C.A. 5), 62 F. (2d) 829.

Each of these three cases was previously cited by the appellee at page 40 of its brief. Appellant Schutz has replied that in each case there was no motion to withdraw any portion of the indictment from the consideration of the jury. This latter statement is not a full consideration of the matter; the cases do not affirmatively state that a motion was made to withdraw part of the indictment. However, we can not assume that the argument was in each case considered upon a faulty record. The only sound belief in any situation where the record discloses no waiver of rights is

that the Court was considering a matter properly before it.

In addition to the above authority, this analogous rule is stated in the following cases:

Anstess v. United States (C.C.A. 7), 22 F. (2d) 594;

Hogan v. United States (C.C.A. 5), 48 F. (2d) 516;

Christiansen v. United States (C.C.A. 5), 52 F. (2d) 950;

Andrews v. United States (C.C.A. 4), 108 F. (2d) 511;

Short v. United States (C.C.A. 4), 91 F. (2d) 614;

Safarik v. United States (C.C.A. 8), 62 F. (2d) 892;

Baker v. United States (C.C.A. 2), 61 F. (2d) 469.

See, also,

Ford v. United States (C.C.A. 9), 10 F. (2d) 339, 273 U.S. 593.

The position of the accused in those cases following the *Kepl* case where there is insufficient evidence as to one object of the conspiracy is the same as the position of the appellants here. In either situation the jury might have reached its general verdict of guilty with regard only to that object of the conspiracy which was not properly submitted to it (either for lack of sufficient evidence or because of an improper

instruction). In either situation the jury, despite its general verdict of guilty, may have rejected the evidence as to those objects properly submitted to it. Yet there is no presumption against the legality of the general verdict of guilty in the cited cases dealing with an insufficiency of evidence as to one object of the conspiracy—and no reason is present to invoke any such rule here.

Counsel for the appellant Schutz argues at page 28 of his supplemental brief that the present case does not come within the pattern of those cases following *Kepl v. United States,* supra, because in that situation the jury must be presumed to find "guilty" as to the object on which there is sufficient evidence, and "not guilty" on the issue as to which there is insufficient evidence. This argument must be flatly rejected. There is no presumption that the jury can determine the question of the legal sufficiency of evidence as to any issue. That is a matter of law, and one which this honorable Court is called upon to decide time and again. The experience of this Court, and the history of appellate procedure runs against any such novel belief. The very submission of the case to the jury is itself an instruction that the evidence, if believed, is sufficient for conviction. We can not presume that the jury rejects this implicit instruction.

CONCLUSION.

On the basis of the arguments hereinabove set forth, and upon those set forth earlier in the Brief of the Appellee, it is submitted that there is no prejudicial error in this case and that the judgment of conviction below should be affirmed.

Dated, San Francisco, California,
December 3, 1947.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

REYNOLD H. COLVIN,
Assistant United States Attorney,

Attorneys for Appellee.

No. 11403

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

vs.

WILLIAM RAY OLSEN, Claimant of One Article of device labeled in part "Spectro-Chrome",

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 870 Brannan Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

HENRY L. HESS,
United States Attorney,

J. ROBERT PATTERSON,
Assistant United States Attorney,
United States Court House,
Portland, Oregon,
for Appellant.

BARNETT H. GOLDSTEIN,
Failing Building,
Portland, Oregon,
for Appellee.

In the District Court of the United States
for the District of Oregon

July Term, A. D., 1945

No. Civ. 2855

UNITED STATES OF AMERICA,

v.

One article of device labeled in part "SPECTRO-CHROME" and accompanying labeling.

LIBEL OF INFORMATION

F. D. C. No. 16781

To the Honorable Judges of the United States District Court for the District of Oregon.

Now comes the United States of America, by Carl C. Donaugh, United States Attorney for the District of Oregon, and shows to the Court:

1. That this libel is filed by the United States of America and prays seizure and condemnation of a certain article of device, as hereinafter set forth in accordance with the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 301 et seq.).

2. That Dinshal Spectro - Chrome Institute shipped in interstate commerce from Newfield, New Jersey, to Portland, Oregon, via Railway Express Agency, on or about June 14, 1945, an article labeled in part "Spectro-Chrome," consisting essentially

of a cabinet equipped with an electric light bulb, an electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article is intended for use in the cure, mitigation, treatment and prevention of disease and to affect the structure and functions of the body of man, together with an assortment of written, printed and graphic matter entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome — December 1941 — Scarlet," "Spectro-Chrome March 1945—Yellow," which relate to said article, and which contained statements and references to the curative and therapeutic value of said article in the cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man.

3. That the aforesaid article is a device within the meaning of 21 U. S. C. 321(h) and when in-

troduced into and while in interstate commerce was misbranded within the meaning of 21 U. S. C. 352(a) in that the following statement which appears upon a label plate attached to the device, namely, "Spectro-Chrome Metry Measurement and Restoration of the Human [1*] Radio-Active and Radio-Emanative Equilibrium (Normalation of Imbalance) by Attuned Color Waves" is false and misleading in this, that said statement represents and suggests that said article of device is capable of measuring and restoring human-radio-active and radio-emanative equilibrium (normalation of imbalance) by attuned color waves, whereas, said article of device is incapable of measuring and restoring human radio-active and radio-emanative equilibrium (Normalation of Imbalance) by attuned color waves since the article is incapable of performing any function of measurement, there is in the human system no radio-active or radio-emanative equilibrium, and the use of color waves will have no effect on Normalation of Imbalance.

4. That said article of device when introduced into and while in interstate commerce, as aforesaid, was further misbranded within the meaning of 21 U. S. C. 352(a) in that the statements and references which appear in the labeling of said article of device, namely, in the printed and graphic matter shipped with said article entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945", "Rational Food of Man," "Key to Radiant

* Page numbering appearing at foot of page of original certified Transcript of Record.

Health," "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome — December 1941 — Scarlet," "Spectro-Chrome—March 1945—Yellow", regarding the claims for said device when used as directed in affecting the structure or any function of the body of man and regarding the curative and therapeutic claims of value for said device when used as directed in the cure, mitigation, treatment and prevention of diseases of man, namely, all disorders of the heart, lungs, skin, nutrition, mentality, emotions, inflamation with pain, with swelling, with fever or with redness, disorders of the blood, genitals, females, children, teeth, with growths or tumors, motor system, sensory system, motion paralysis, sense paralysis, blindness, deafness, gonorrhea, syphilis, ulcers, chancres, smallpox, scarlet fever, diptheria, whooping cough, chicken pox, measles, German measles, mumps, fallen womb, habitual tendency to miscarriage, impending miscarriage, during pregnancy, during childbirth, sterility, burns of any degree, sunstroke, diabetes, sex frigidity, excessive sex craving, accident, gastritis, appendicitis, meningitis, rupture, consumption or tuberculosis, boils, abscesses, carbuncles, furuncles, facial sag, leaky heart, hiccoughs, arthritis, rheumatism, cataract, x-ray and radium destruction, the control of cancerous growths, as a liver energizer, hemoglobin

builder, respiratory stimulant, parathyroid depressant, thyroid energizer, anti-spasmodic, galactagogue, antirachitic, emetic, stomachic, lung builder, motor stimulant, alimentary tract energizer, lymphatic activator, splenic depressant, digestant, cathartic, cholagogue, anthelmintic, nerve builder, cerebral stimulant, thymus activator, antacid, chronic alterative, anti-scorbutic laxative, expectorant, bone builder, pituitary stimulant, disinfectant, purificator, antiseptic, germicide, bactericide, detergent, muscle and tissue builder, cerebral depressant, acute alterative, tonic, skin builder, antipruritic, diaphoretic, febrifuge, counterirritant, anodyne, demulcent, vitality builder, parathyroid stimulant, thyroid depressant, respiratory depressant, astringent, sedative, pain reliever, hemostatic, inspissator, phagocyte builder, splenic stimulant, cardiac depressant, lymphatic depressant, leucocyte builder, venous stimulant, renal depressant, antimalarial, vasodilator, anaphrodisiac, narcotic, antipyretic, analgesic, sex builder in [2] supernormal, suprarenal stimulant, cardiac energizer, diuretic, emotional equilibrator, auric builder, arterial stimulant, renal energizer, genital excitant, aphrodisiac, emmenagogue, vasoconstrictor, ecbolic, sex builder in subnormal and other diseases, conditions, symptoms and disorders are false and misleading in this, that said statements and references represent and suggest and create in the mind of the reader thereof the impression that the said article of device when used in accordance with the directions for use appearing in the aforesaid labeling is effective in the

cure, mitigation, treatment and prevention of the diseases, disorders, conditions and symptoms stated and implied and in affecting the structure and functions of the body of man, and when said device is so used constitutes a safe and appropriate treatment therefor, whereas, the said article of device when used in accordance with said directions for use or when used in any manner whatsoever is of no value in the cure, mitigation, treatment or prevention of any disease, disorder, condition, symptom or in affecting the structure of any functions of the body of man and when so used as directed may delay appropriate treatment of serious diseases, resulting in serious or permanent injury or death to the user.

5. That the aforesaid article of device is in the possession of William R. Olsen, 7425 Southeast Insley Street, Portland, Oregon, or elsewhere within the jurisdiction of this Court.

6. That by reason of the foregoing, the aforesaid article is held illegally within the jurisdiction of this Court, and is liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C. 334.

Wherefore, libellant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction issue against the aforesaid article; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the

condemnation of the aforesaid article and grant libelant the costs of this proceeding against the claimant of the aforesaid article; that the aforesaid article be disposed of as this Court may direct pursuant to the provisions of said Act; and that libellant have such other and further relief as the case may require.

Dated: Portland, Oregon, July 26th, 1945.

UNITED STATES OF AMERICA,

By CARL C. DONAUGH,
U. S. Attorney,

J. ROBERT PATTERSON,
Assistant U. S. Attorney. [3]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that the facts set forth in the foregoing Libel Condemnation are true as I verily believe; that I make this affidavit of verification for the reason that I am authorized to bring this libel by the Honorable Attorney General of the United States, and that I have prepared the foregoing libel and make the allegations therein contained upon information furnished me by the General Counsel of the Federal Security Agency.

J. ROBERT PATTERSON.

Subscribed and sworn to before me this 26th day of July, 1945.

LOWELL MUNDORFF,
Clerk.

By VERNE O. BISHOP,
Deputy.

[Endorsed]: Filed July 26, 1945. [4]

[Title of Cause.]

ORDER ALLOWING LIBEL TO BE FILED

July 26, 1945.

Now at this day upon motion of Mr. J. Robert Patterson, Assistant United States Attorney.

It Is Ordered that he be and is hereby allowed to file a libel herein. [5]

[Title of District Court and Cause.]

ORDER

A libel having been filed in the above-entitled cause, on the 26th day of July, 1945, and being fully advised of the law and the facts, and it appearing therefrom to be a proper cause, Now, Therefore, It Is Hereby Considered and Ordered by the Court that process in due form of law issue against the property described in said libel, and that all persons interested in said described property be

cited to file answer to said libel, setting forth their interest in or claim to said property libeled, if any they have, with the Clerk of this Court, in the City of Portland, in the District of Oregon, on or before the 3rd day of September, 1945, which said day is hereby fixed as the return date thereof;

It Is Further Ordered That notice be given to all persons interested in said property, by causing the substance of said libel, with the order of court setting the time and place appointed for the trial and hearing of said libel, to be published three times at least fourteen days prior to the said 3rd day of September, 1945, in the "Daily Journal of Commerce," a newspaper of general circulation at Portland, Oregon, and near the place where said property was seized.

Dated at Portland, Oregon, this 26th day of July, 1945.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed July 26, 1945. [6]

United States District Court, District of Oregon

WARRANTS OF SEIZURE AND MONITION

The President of the United States of America
To the Marshal of the District of Oregon—
Greeting:

Whereas, on the 26th day of July, A. D. 1945, a Libel of Information was filed in the United

States District Court for said District of Oregon by J. Robert Patterson, Assistant United States attorney for said District, on behalf of the United States against One article of device labeled in part "Spectro-Chrome" and accompanying labeling, and praying that all persons interested in said goods, wares, and merchandise may be cited in general and special, to answer the premises; and due proceedings being had, that the said goods, wares, and merchandise may, for the causes in said Information mentioned, be condemned as forfeited to the use of the United States.

You Are Therefore Hereby Commanded To attach the said goods, wares, and merchandise, and to detain the same in your custody until further order of said Court respecting the same; and to give notice of all persons claiming the same, or knowing or having anything to say why the same should not be condemned as forfeited to the use of the United States, pursuant to the prayer of said Information, that they be and appear before the said Court, at the city of Portland on the 3rd day of September, 1945 next, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you have done in the premises, do you then and there make return thereof, together with this writ.

Witness the Honorable James Alger Fee and the Honorable Claude McColloch, United States Dis-

trict Judges at Portland, Oregon, this 27th day of July, A. D. 1945.

[Seal] LOWELL MUNDORFF,
Clerk,

By /s/ F. L. BUCK,
Chief Deputy Clerk.

[Endorsed]: Filed July 31, 1945. [7]

United States Marshal's Return

District of Oregon—ss.

Received the within writ the 28th day of July, 1945, and executed same. I hereby certify and return that I served the annexed Warrant of Seizure and Monition on the therein named One article of device labeled in part "Spectro-Chrome"; and accompanying labeling, at 7425 S. E. Isley St., Portland, Oregon, at 11:15 a.m. this 28th day of July, 1945 by Seizing and removing the said "Spectro-Chrome" etc, by handing to and leaving a true and correct copy thereof with William R. Olsen, and stored the same in the U. S. Marshal's Office in the United States Court House.

Dated at Portland, Oregon, this 28th day of July, 1945.

JACK R. CAUFIELD,
U. S. Marshal,

By /s/ W. H. RICKARD,
Deputy Marshal.

[Title of Cause.]

RETURN ON SERVICE OF WRIT

United States of America,
District of Oregon—ss.

I hereby certify and return that I posted the annexed Three (3) Notices Warrant of Seizure and Monition on the therein-named "Spectro-Chrome" etc, by posting one on the bulletin board in the U. S. Post Office at Glisan & Brody St., one on the bulletin board in the Multnomah County Court House, and one on the bulletin board in the United States Court House, by posting to and leaving a true and correct copy thereof on the aforesaid bulletin boards personally at Portland, in said District on the 28th day of July, 1945.

JACK R. CAUFIELD,
U. S. Marshal,

By /s/ W. H. RICKARD,
Deputy.

[Title of Cause.]

AFFIDAVIT OF PUBLICATION

State of Oregon,
County of Multnomah—ss.

I. W. H. Caplan, being first duly sworn, depose and say that I am the Manager of The Daily Journal of Commerce, a newspaper of general circulation as defined by Section 1-610 Oregon Compiled Laws Annotated, printed and published at Port-

land in the aforesaid County and State, that Notice (Spectro-Chrome) a printed copy of which is hereto annexed and marked "Exhibit A," was published in the entire issue of said newspaper for three successive and consecutive days in the following issues: Aug. 1st, 1945, Aug. 2nd, 1945, Aug. 3rd, 1945.

/s/ W. H. CAPLAN.

Subscribed and sworn to before me this 3rd day of August, 1945.

[Seal] /s/ EVELYNNE HANSON,
Notary Public for Oregon.

(My Commission expires March 1, 1945.)

"EXHIBIT A"

Notice

In the District Court of the United States for the District of Oregon, United States of America v. One Article of Device labeled in part "Spectro-Chrome" and accompanying labeling. Public Notice Is Hereby Given that on the 28th day of July, 1945, 1 Article of Device labeled in part "Spectro-Chrome", together with accompanying labeling, was arrested and taken into the possession of and now is in the possession of the United States Marshal for the District of Oregon, pursuant to a warrant and process duly issued by the Clerk of the United States District Court for the District of Oregon, in a suit for condemnation and forfeiture entitled United States of America, Libelant v. One Article of Device labeled in part "Spectro-Chrome" and

accompanying labeling, brought under the provisions of Section 334, Title 21, U.S.C.A., wherein it is sought to have the above described article of device condemned and forfeited for the following reasons: That on or about the 14th day of June, 1945, the said article of device was shipped in interestate commerce from Newfield, New Jersey, to Portland, Oregon; that the said article of device is misbranded within the purview of Title 21, United States Code, Section 352(a), in that the statements which appear in the labeling of said article of device are false and misleading; that all persons claiming any right, title or interest in and to the said article of device are hereby notified to appear on or before the 3rd day of September, 1945, in the Federal Court at Portland, Oregon, to show cause, if any there be, why the same should not be decreed against and forefeited to the United States as a misbranded article of device.

JACK R. CAUFIELD,
U. S. Marshal,

CARL C. DONAUGH,
U. S. Attorney for the District of Oregon,

J. ROBERT PATTERSON,
Assistant U. S. Attorney.

Published August 1, 2, 3, 1945.

4774-3T

[Endorsed]: Filed Aug. 17, 1945. [10]

[Title of District Court and Cause.]

APPEARANCE AND ANSWER OF CLAIMANT TO LIBEL OF INFORMATION

To the Honorable Judges of the United States District Court for the District of Oregon.

Now comes William Ray Olsen, a resident and inhabitant of the City of Portland, County of Multnomah, State of Oregon, and residing at 7425 S. E. Insley Street, in said City and State, as claimant of the above described device labeled "Spectro-Chrome", and files his appearance in the above entitled proceeding and alleges as his claim and answer thereto:

I.

That he is the sole owner of and entitled to the exclusive possession of the aforesaid device labeled "Spectro-Chrome", which was unlawfully and forcibly seized and taken by the libelant from the possession of said claimant, over his protests and against his consent, while said personal property was in his home at 7425 S. E. Insley Street, Portland, Oregon, and which was not then and there subject to the jurisdiction or processes of this court.

II.

Admits that the aforesaid libel was filed by the United States of America praying seizure and condemnation of said device, as alleged in paragraph I of said libel, and further admits that the aforesaid device at the time of the seizure was in the possession of the claimant at 7425 S. E. Insley

Street, Portland, Oregon, as alleged in Paragraph 5 of said libel. [11]

III.

Save and except as hereinbefore specifically pleaded and admitted, the answering claimant herein denies each and every other allegation contained in Paragraphs I to VI inclusive, of the libel filed herein.

Wherefore the said claimant demands judgment that the libel filed herein be dismissed and that a decree be entered directing the return of said device labeled "Spectro-Chrome" to the said claimant, and for such other and further relief as the nature of the case may require, together with his costs and disbursements incurred herein.

/s/ BARNETT H. GOLDSTEIN,
Attorney for Claimant.

State of Oregon,
County of Multnomah—ss.

I, William Ray Olsen being first duly sworn, say that I am the Claimant in the within entitled Proceeding and that the foregoing Answer is true as I verily believe.

/s/ WILLIAM RAY OLSEN.

Subscribed and sworn to before me this 30th day of August, 1945.

[Seal] /s/ BARNETT H. GOLDSTEIN,
Notary Public for Oregon.

My Commission Expires November 3, 1947.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof. as required by law, is hereby accepted in Multnomah County, Oregon, on this 31 day of August, 1945.

/s/ J. ROBERT PATTERSON,
Attorney for Libelant.

[Endorsed]: Filed Aug. 31, 1945. [12]

[Title of District Court and Cause.]

MOTION

Comes now Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and moves the Court for an order directing the United States Marshal to detach from the Spectro-Chrome device which was heretofore seized pursuant to process issued in the above-entitled case, the sealed slide-containing semaphore, and to deliver it to a representative of the Food and Drug Administration in order that a scientific examination may be made of these colored slides, the slides being a component and principal part of the Spectro-Chrome device.

Dated at Portland, Oregon, this 20th day of February, 1946.

HENRY L. HESS,
United States Attorney for the District of Oregon,
J. ROBERT PATTERSON,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

Due and legal service of the within Motion is hereby accepted within the State and District of Oregon, on the 20 day of February, 1946, by receiving a copy thereof duly certified to as true and correct copy of the original by J. Robert Patterson, Assistant United States Attorney for the District of Oregon.

/s/ BARNETT H. GOLDSTEIN,
Attorney for Claimant.

[Endorsed]: Filed Feb. 20, 1946. [13]

[Title of District Court and Cause.]

MOTION FOR AN ORDER DIRECTING CLAIMANT TO FILE STIPULATION FOR COSTS.

Now comes the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, by J. Robert Patterson, Assistant United States Attorney, and moves this court to direct the claimant in this action to give a stipulation for costs for the following reasons:

1. That a proceeding similar to this action was tried in the United States District Court for the Eastern District of New York, being entitled

"United States of America, Libelant, vs. One article of device labeled in part 'Spectro-Chrome' and accompanying literature," Docket No. 894, which proceeding began on May 14, 1945, and was concluded on June 26, 1945;

2. That in the foregoing proceeding in the Eastern District of New York the costs and expenses were taxed as follows:

Statutory Costs	$ 20.00
Fee, Filing Libel	5.00
Fee, Entry Decree	5.00
United States Marshal's Fee	15.65
Witnesses' Fees	2486.20
Taxed at	$2531.85

3. That it is the firm belief of your movant that the length of time required to try this action and the expenses incident thereto will approximate that of the proceeding previously tried in the Eastern District of New York aforesaid;

4. That pursuant to Rule 24 of the Admiralty Rules this court may direct the claimant herein to give a stipulation or an approved [14] corporate surety in such sum as the court shall direct to pay all costs and expenses which may be taxed against the claimant by the final decree of this court in this proceeding;

Wherefore, it is moved that the claimant herein be directed by an order of this court to give a stipulation or approved corporate surety in such

an amount as this court may determine and direct at the hearing on this motion.

HENRY L. HESS,

United States Attorney for the District of Oregon,

/s/ J. ROBERT PATTERSON,

Assistant United States Attorney. [15]

[Title of District Court and Cause.]

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I. J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Motion for an Order Directing Claimant to File Stipulation for Costs on the Claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 4th day of March, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Mr. Barnett

H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for Claimant.

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney.

Subscribed and sworn to before me this 4th day of March, 1946.

/s/ R. DeMOTT,
Deputy Clerk.

[Endorsed]: Filed Mar. 4, 1946. [16]

[Title of Cause.]

ORDER RESERVING DECISION ON LIBELANT'S MOTION

March 11, 1946.

Libelant appearing by Mr. J. Robert Patterson, Assistant United States Attorney, claimant by Mr. Barnett H. Goldstein, of counsel. Whereupon this cause comes on to be heard upon the motion of the United States to detach slides and make a scientific examination and upon motion for an order directing claimant to file a stipulation for costs herein, and the Court having heard the arguments of counsel will take under advisement the order allowing motion of the United States to detach slides and make a scientific examination, and

It Is Ordered that the question of lawful seizure and the motion for an order directing claimant to

file stipulation for costs be and they are hereby reserved to the time of the pre-trial conference, and

It Is Further Ordered that claimant be and it is hereby allowed ten days from this date within which to file its brief on the question of lawful seizure; that libelant be and it is hereby allowed ten days thereafter within which to file its answer and that claimant be and it is hereby allowed five days thereafter within which to file its reply.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Because I was told that the Department of Justice was making this a test case for many similar cases throughout the country, I took some time before ruling, although it seemed plain to me at the outset that defendant's constitutional rights had been invaded.

Defendant has purchased a Spectro-Chrome for the use of himself and his mother. The prospectus promises many cures. A color, or a combination of colors, will cure this, another combination of color will cure that. The Government obtained a judgment that the machine was fraudulent in proceedings against the manufacturer and, because this machine was shipped in interstate commerce, the Government claims the right to take it from defendant, though he has bought and paid for it and is using it in his home. In fact, the Marshal

now has the machine in his possession, and this is a motion by the Government for permission to dismantle the machine for examination.

On what conceivable basis, under our Constitutional guaranties can the Government deny to an adult individual the right to believe in and seek to cure himself of physical ailments by any means he chooses, so long as the means chosen is not inherently dangerous or harmful? I know many people who wear charms, including some who carry the lowly potato, to keep diseases away, and I had always thought they had the right to do this. Incidentally, I have no [18] doubt that many get help in this manner.

I have not mentioned the special guaranties afforded by our law against intrusion into the home. This ground, I feel confident, could be shown to be sufficient to denounce the seizure in this case as unlawful.

Since writing what is above I have been advised that the Government is contemplating dismissing the case and returning the Spectro-Chrome to defendant's home. If that is done, it is likely that nothing more will need to be said.

The Government's motion is denied.

Dated this 4th day of April, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 4, 1946. [19]

[Title of Cause.]

ORDER DENYING LIBELANT'S MOTION TO DETACH SLIDES

April 4, 1946.

This cause was heard by the Court upon the motion of the United States of America to detach slides and make a scientific examination, and was argued by Mr. J. Robert Patterson, Assistant United States Attorney and Mr. Barnett H. Goldstein, of counsel for claimant. Upon consideration whereof the Court hands down its opinion and directs that the same be filed and,

It Is Ordered that said motion be and the same is hereby denied.

[Title of Cause.]

ORDER SETTING CAUSE FOR TRIAL

April 16, 1946.

Plaintiff appearing by Mr. J. Robert Patterson, Assistant United States Attorney, and the claimant, William Ray Olson by Mr. Barnett H. Goldstein, of counsel. Whereupon defendant moves the Court for dismissal of this cause, and the Court having heard the statements of counsel,

It Is Ordered that this cause be and it is hereby set for trial for Tuesday, May 21, 1946 at ten o'clock a.m. [21]

[Title of District Court and Cause.]

MOTION

1. To Quash Warrant
2. To Restore seized article to Claimant
3. To dismiss libel proceedings.

Comes now William R. Olsen, claimant herein, and respectfully moves this court for an order:

a. Quashing and setting aside warrant issued by the Clerk of this court for the seizure of article of device labeled "Spectro-Chrome".

b. Restore and return to claimant said article of device.

c. Dismiss the within libel proceedings.

This motion is made upon the following ground and for the following reasons:

1. Said warrant for the seizure of said property was issued without the showing of probable cause supported by oath or affirmation to the personal knowledge of affiant.

2. That the warrant for the seizure of said property was issued by the Clerk of this Court without any order or mandate of this court.

3. That the aforesaid property was seized and taken from the private home of said claimant over his protests and against his will in violation of his constitutional rights and without due process of law.

4. That the aforesaid seizure was made of an

article of device which was not then and there subject to the jurisdiction or [22] process of this court, in this, that said article was not then and there being transported in interstate commerce or was in the course of interstate commerce, but exclusively within the possession of claimant in his private home and was being used for his personal use and benefit with no intention of transporting or selling the same, and that said seizure was therefore not within the jurisdiction of this Court.

In support of said motion the affidavit of the said claimant, William R. Olsen, is attached hereto and made a part hereof.

/s/ BARNETT H. GOLDSTEIN,
Attorney for Claimant.

/s/ WILLIAM R. OLSEN,
Claimant. [23]

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, William R. Olsen, being first duly sworn depose and say: That I am the claimant in the above entitled proceeding; that I am over 21 years of age, am a citizen of the United States and at all times herein mentioned have been and still am a resident of the City of Portland, County of Multnomah, State of Oregon; that I reside and make

my home with my mother at 7425 S. Insley Street in said City, County and State.

That on, to-wit: on or about July 28, 1945, a Deputy United States Marshal, against my will and without my consent, forcibly entered my home at 7425 S. Insley Street, Portland, Oregon, and claiming to be acting under a warrant of seizure issued in the above entitled court and cause, forcibly seized and against my will and without my consent and over my protests, removed from my home and premises a certain device and apparatus, known and labeled as "Spectro-Chrome", which said device and apparatus was my own personal property, having been bought and paid for by me and was in my lawful possession in my home, and was being used therein by me and my mother for our own personal use and benefit.

That said warrant of seizure was unlawfully issued by the Clerk of this Court without any order or mandate of the court so to do and that by reason thereof said seizure by the said Deputy United States [24] Marshal of said property from my home was illegal, unlawful and in violation of my civil and constitutional rights.

That said device and apparatus at the time of said seizure was not used or intended to be used or sold in interstate commerce, and was not misbranded or intended to be misbranded, and was not used or intended to be used for any person or persons other than myself and my mother; that by reason of the foregoing the said device and apparatus was not

then and there subject to jurisdiction or process of this court.

That said device and apparatus so possessed by me and so kept in my home and on my premises was not and is not inherently dangerous or harmful to me or to my mother in any degree whatsoever, and same was being used by me and my mother for our own private use and purposes, to-wit: for the purpose of attempting to effect a treatment of certain nervous disorders, and that its use had been beneficial to us for the purposes for which it was intended.

That the wrongful seizure of my personal property from my own private home and premises is contrary to the constitution and laws of the United States and that the wrongful detention thereof by the Government without any lawful or constitutional authority therefor deprives me of my personal property without due process of law.

Wherefore I respectfully petition this court for the restoration to me of the said device and apparatus described as "Spectro-Chrome".

/s/ WILLIAM R. OLSEN.

Subscribed and sworn to before me this 23 day of April, 1946.

[Seal] /s/ BARNETT H. GOLDSTEIN,
Notary Public for Oregon.

My Commission expires: November 3, 1947.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law,

is hereby accepted in Multnomah County, Oregon, on this 23d day of April, 1946.

/s/ J. ROBERT PATTERSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 23, 1946. [25]

[Title of District Court and Cause.]

MOTION

Comes now the United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and it appearing from the records on file herein that William Ray Olsen has appeared in the above-entitled proceeding and has filed his appearance and answer alleging his claim to the above-mentioned device, and moves the Court for a Summary Judgment in favor of the United States of America.

Dated at Portland, Oregon, this 24th day of April, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney. [26]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service of the foregoing Motion on the claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 24th day of April, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Mr. Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, attorney for claimant.

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney.

[Endorsed]: Filed April 24, 1946. [27]

[Title of Cause.]

ORDER DIRECTING SEIZED ARTICLES TO BE RESTORED TO CLAIMANT

April 29, 1946.

Plaintiff appearing by Mr. J. Robert Patterson, Assistant United States Attorney, claimant, William R. Olson by Mr. Barnett H. Goldstein, of counsel. Whereupon this cause comes on to be heard upon claimants motion to quash the warrant of arrest herein; to restore the seized articles to said claimant and to dismiss the proceedings herein. The Court having heard the arguments of counsel,

It Is Ordered that the seized articles be returned to claimant. [28]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
District of Oregon—ss.

I, William Rickard, being first duly sworn, depose and say: That I am the Deputy United States Marshal for the District of Oregon and that on the 28th day of July, 1945, I was handed a warrant of seizure and asked that I execute it against an article of device labeled in part "Spectro-Chrome" and accompanying labeling. I was informed that the device was in the possession of William R. Olsen at 7425 S. E. Insley Street, City of Portland, State of Oregon. I thereupon called the Food and Drug Administration and asked that Mr. David J. Holliday, an inspector, accompany me to the Olsen residence for the purpose of identifying the machine and literature. At about 11 a.m. on this date we called at the residence at this address and upon knocking, the son, William R. Olsen, opened the door. Mr. Holliday introduced me to Mr. Olsen and told him that I was a deputy United States Marshal. The father, William Olsen, also came to the door about this time. I informed him that I had a warrant for the seizure of the machine, "Spectro-Chrome" and accompanying labeling. They invited us in and, after going into the living room, I began reading the warrant to them. They both interrupted me and a long conversation thereupon took place regarding the merits of the machine, "Spectro-Chrome", and my right to

seize the machine. Mrs. Olsen also came into the living room and was present during this conversation. I informed them that I was merely an officer of the court and that I had my orders to seize the [29] machine, that I had this warrant directing the seizure and that I was merely executing it and had no part in determining the merits of the device. I informed them that they had 30 days within which to redeem the machine and that they had best talk to their lawyer or to the United States Attorney. They told me that they would not permit me to take the machine from their residence and I then stated to them that if they would not give it up it would be necessary that I return to the Marshal's office to obtain additional papers and further instructions. After a long conversation, the father stated that I was only doing my duty and that in view of the fact that they would have 30 days within which to redeem the machine and also obtain the assistance of a lawyer, his son had better let me take the machine. The son then stated that we could take the machine. The son went into the bedroom and brought the "Spectro-Chrome" machine into the living room. Mr. Holliday asked for a screw-driver and the son went out of the room and came back with a screw-driver and handed it to Mr. Holliday. Mr. Holliday then removed two bolts from the stand; during this time the son held the large box to prevent it from falling. Mr. Holliday asked the son whether he still had the literature and the son thereupon went to a drawer, obtained the literature, and delivered it to us. I thereupon

took the machine and accompanying literature, assisted by Mr. Holliday, and left the residence. We brought the machine and accompany literature directly to the U. S. Marshal's office in the U. S. Court House and locked it up.

/s/ WILLIAM H. RICKARD.

Subscribed and sworn to before me this 1st day of May, 1946.

[Seal] /s/ V. E. HARR,

Notary Public for Oregon.

My Commission expires: Jan. 1, 47. [30]

[Title of District Court and Cause.]

AFFIDAVIT

I, David J. Holliday, being first duly sworn, depose and say.

That I am an Inspector for the Food and Drug Administration, a branch of the Federal Security Agency, and am stationed in Portland, Oregon.

That on the 28th day of July, 1945, I received a telephone call from the Deputy Marshal asking that I go with him to the home of William R. Olsen, located at 7425 S. E. Insley Street, in the City of Portland, State of Oregon, for the purpose of executing a warrant of seizure against an article

of device labeled in part, "Spectro-Chrome" and accompanying labeling; I had previously been to the William R. Olsen residence on the 21st day of July, 1945, and at that time had talked with William Olsen and members of his immediate family concerning the device known as "Spectro-Chrome"; that about 11 a.m., together with William Rickard, deputy U. S. Marshal, we called at the William Olsen residence and upon knocking at the door William R. Olsen opened it and I introduced the deputy marshal to Mr. Olsen. While I was thus introducing the deputy marshal, the boy's father also came to the door and the deputy marshal stated to them that he had a warrant for the seizure of the "Spectro-Chrome" machine and accompanying labeling. We were invited inside the house and the Marshal began reading the warrant to the two men. As soon as the discussion started the mother appeared and was present during all the conversation that followed. The Olsens interrupted the Marshal while he was attempting to read the [31] warrant and a discussion took place relative to the Marshal's right to seize the machine. The deputy marshal explained that he had a warrant issued by the Clerk of the Court directing him to seize the machine and accompanying labeling and that he was merely carrying out his duties and that he had instructions to execute the warrant and seize the machine. The Olsens protested to the Marshal that he had no right to seize the machine and that they were protesting the seizure and would not permit him to take the machine from their residence. The Marshal at that

time stated to the Olsens that unless they would give up the machine to him, it would be necessary that he return to the Marshal's office to acquire further papers and instructions. After a long discussion regarding the merits of "Spectro-Chrome" and the Marshal's right to seize the machine, the father stated that the Marshal was only doing his duty and that after all they had 30 days within which to redeem the machine, having been so advised by the deputy marshal, and that therefore they had better let the Marshal take it. The son then agreed that the Marshal could take the machine. The Marshal advised him that he could see his attorney or talk with the United States Attorney concerning the seizure. Thereupon the son went into the bedroom and obtained the machine and brought it out into the living room.

Before removing the machine from the premises it was necessary that we dismantle it to some extent. The son upon my request for a screw-driver left the living room, procured a screw-driver, returned to the living room and gave it to me. I thereupon proceeded to remove two bolts from the stand of the machine. The son, William Olsen, held the box which contains the bulb and slides while I was removing the bolts. I asked the boy if he still had the literature that I had seen previously and that we also wanted that. William R. Olsen went to a desk and from a drawer in the desk procured the literature and handed it to me. I thereupon assisted the Marshal in bringing the machine and literature to the car. We then brought the machine

and literature direct to the Marshal's office in the U. S. Court House.

/s/ DAVID J. HOLLIDAY.

Subscribed and sworn to before me this 1st day of May, 1946.

[Seal] /s/ V. E. HARR,
Notary Public for Oregon.

My commission expires January 7, 1947. [32]

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Affidavits of William Rickard and David J. Holliday on the claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 1st day of May, 1946, a duly certified copy of each, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, attorney for claimant, William R. Olsen, Jr.

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney.

[Endorsed]: Filed May 1, 1946. [33]

[Title of District Court and Cause.]

PETITION

Comes now the United States of America by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and based upon the records on file herein and the previous proceedings had herein, the orders filed herein, and directions of this Court, petitions the Court for an order directing William R. Olsen, claimant, who has previously appeared herein and filed his claim and answer, to produce the article of device known as "Spectro-Chrome" and accompanying labeling on the 21st day of May, 1946, before this Honorable Court, for the purposes of trial.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Petition on the claimant herein, by depositing in the United State Post Office at Portland, Oregon, on the 1st day of May, 1946, a duly certified copy of said

Petition, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, attorney for claimant herein.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed May 1, 1946. [34]

[Title of District Court and Cause.]

APPLICATION FOR PRE-TRIAL CONFERENCE

Comes now the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and respectfully petitions the court for an order directing Claimant to appear before the Court on the 20th day of May, 1946, for the purpose of pre-trial conference in order that the issues may be simplified and for the further reason that a pre-trial order may be entered limiting the issues for trial.

Dated at Portland, Oregon, this 8th day of May, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney. [35]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Application for Pre-Trial Conference on the Claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 8th day of May, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at Law, 1225 Failing Building, Portland, Oregon, Attorney for Claimant.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed May 8, 1946. [36]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated in the above-captioned case by and between the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and the claimant herein, William R. Olsen, and by his attorney, Barnett Goldstein, subject to the reservations here-

inafter set forth, that the following are admitted as facts as though the same were developed by testimony from witnesses under oath in open court to apply in the determination of issues joined, and which, if competent, material and relevant thereto, are to be taken as facts binding upon the parties hereto and named above.

That Dinshah shipped in interstate commerce from Newfield, New Jersey, via Railway Express Agency, on or about June 14, 1945, consigned to William R. Olsen claimant herein, a carton containing an article labeled in part "Spectro-Chrome" consisting essentially of a cabinet equipped with an electric light bulb, an electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article was intended for use in the cure, mitigation, treatment and prevention of disease and to effect the structure and functions of the body of man, and containing an assortment of written, printed and graphic matter entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," 2 "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make your Own Independent Income as Our Introducer," 5 "Spectro-Chrome [37] General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome—December 1941—Scarlet," "Spectro-Chrome March 1945—

Yellow," which relate to said article, and which contained statements and references to the curative and therapeutic value of said article in the cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man; that said carton containing said article and said items of written, printed, and graphic matter, constituting accompanying labeling within the meaning of 21 U. S. C. 321 (m), were received in interstate commerce by said claimant at Portland, Oregon, on or about June 25, 1945.

That said article is a device within the meaning of 21 U. S. C. 321 (h) and when introduced into and while in interstate commerce its label and labeling, described above, did contain, within the meaning of 21 U. S. C. 352(a), a number of false and misleading statements regarding the capability of the device in measuring and restoring human radio-active and radio-emanative equilibrium and false and misleading statements of claims for said device when used as directed in affecting the structure and functions of the body of man and of its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of diseases, conditions, symptoms and disorders of man.

It is understood and agreed that the claimant,

by the admissions and stipulations herein contained, does not admit that the same are competent, material or relevant herein, by reason of the following contentions of the claimant, which are factually denied by the Government:

(1) That the court has no jurisdiction over the subject matter of this proceeding, in that, the device, at the time of its seizure from the home of the claimant, was not then being transported or was in the course of interstate commerce, but that it had passed beyond interstate commerce [38] channels and was within the private home and in the exclusive possession of the claimant, with no intention of transporting, selling or otherwise disposing of same, but was acquired, used and intended to be used for the personal use and benefit of the claimant and members of his family, and for no other person or persons, and as so used, in the home of said claimant, it was not labelled within the meaning of the Food, Drug and Cosmetic Act.

(2) That the seizure of said article from the claimant's home at the time and under the conditions and circumstances alleged by claimant, was illegal and in direct violation of the constitutional rights of said claimant, and that the taking of said personal property from the home of and belonging to said claimant was and would be without due process of Law.

That only as to said matters, both parties hereto reserve the right to present testimony in support of and in opposition thereto.

Dated at Portland, Oregon, this 6th day of May, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

/s/ BARNETT GOLDSTEIN,
Attorney for Claimant.

/s/ WILLIAM R. OLSEN,
Claimant.

[Endorsed]: Filed May 15, 1946. [39]

[Tile of Cause.]

ORDER DENYING MOTION

May 21, 1946

Libelant appearing by Mr. J. Robert Patterson, Assistant United States Attorney; Federal Securities Agency by Mr. J. L. Maguire, of proctors, and the claimant, William Ray Olsen by Mr. B. H. Goldstein, of proctors. Whereupon it is ordered that the motion of the libelant for an order directing the claimant to produce device in court and libelant's motion for a summary judgment heretofore filed herein be and each of said motions is hereby denied. Thereafter, this cause comes on to be tried before the Court without the intervention of a jury and the Court having heard the evidence adduced will advise thereof.

[Title of District Court and Cause.]

OPINION

This case having now been tried on the merits revives the question whether an inanimate object, inherently non-dangerous, which the owner thinks has therapeutic value, can be taken from him and his home, under process pursuant to the Federal Food and Drugs Act.

It has been stipulated that the device was shipped in interstate commerce, labeled with false and misleading statements as to its therapeutic capabilities. Regardless, the owner testified that he was satisfied with the machine and wanted to keep it, and that he and his mother had both obtained help for certain disorders by using the machine. He testified further that he did not intend to make commercial use of the machine, did not intend to permit it to be used outside of his home, or by others than his immediate family, constituting his parents and two brothers, both over twenty-one years of age and having had the same education as Claimant, in the grammar and high schools of the city of Portland, Oregon. The Claimant is twenty-three years old, and was employed during the war in aircraft production, where he made use of the education which he had received in technical high school.

The Government relies on the words of the statute, that an article introduced into interstate commerce, with fraudulent representations as to its therapeutic value, may be seized and condemned "while in interstate commerce or any time there-

after . . ." 21 USC Sec. 334 (a). [41] The underlined words, the Government contends, permit it to pursue and seize the article and the literature containing the misleading statements, in a private home.

As shown by an earlier memorandum, the article was seized by the Marshal on initial process, but I must now add that prior to the trial on the merits just concluded, and subsequent to the preliminary memorandum, I directed that the Spectro-Chrome be returned to Claimant's home—so that the case might present, as it now does, the clear cut issue, whether an instrument, harmless in itself, but accompanied by misleading literature as to the capabilities of the instrument, may be seized against his will from an adult male person, compos, who states that he is satisfied with the machine, is being helped by its use, and wishes to keep it.

I think this issue has not before been directly presented and I think, as Judge Cooley said many years ago, that the question is—does this case constitute an exception to the general rule that the citizen's home is his castle, the security of which he may defend against all trespass? The Government has a heavy burden to establish the exception.

"Near in importance to exemption from any arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers

against even the process of the law, except in a few specified cases. . . ." (p. 425)

". . . it would generally be safe . . . to regard all those searches and seizures 'unreasonable' which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies." (p. 433)

Constitutional Limitations (7th Ed.)

This case does not present such an exception. The case is nothing more than a well intentioned effort by high-minded and [42] zealous officials to protect a man from what they deem to be folly, to the extent of following him into his home and family and there divesting him of property. This cannot be done, and I regret that I find myself in dissent from those Districts where, in connection with the nationwide campaign to retrieve Spectro-Chrome machines, wherever found, contempt orders have been issued to private owners to compel delivery for condemnation.

To me, the wisdom of the ages means nothing if this humble citizen can be compelled against his will to yield access to his home to Federal officers to take from him and destroy a mechanical object, perfectly harmless in itself, which he thinks (whether rightly or wrongly makes no difference) is beneficial to him. My conception of the meaning of the Fourth Amendment is, that the citizen alone can unlock the doors to his dwelling, except in the rarest cases, and this is not one of the exceptions.

Coke is credited with the maxim that "An Englishman's home is his castle" (which is morticed into the Fourth Amendment of our National Bill of Rights), and I cannot resist adding the imperishable words by Chatham, of a later English generation:

"The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

The Right to Prescribe for Oneself

Turning to the other major question in the case, no authority has been shown me that supports the position of the Government, which while admitting the Spectro-Chrome is not inherently dangerous, says in its brief: "It is claimed to be indirectly dangerous because the ailment of the user is aggravated by reason of the failure to consult competent medical authority."

This is admirable frankness on the part of the Government, but, as stated, it is supported by no authority, and I venture that it can be supported by none. I hesitate to labor the point, in opposition to this claim [43] of paternal right, to control the manner in which a person shall seek to cure himself. So many years, generations now, have been devoted to demonstrating that man is often his own best doctor, aside from the question of terrific im-

port of personal liberty involved—it would but be stirring old waters, long calm, to review the successful struggle of healing groups and faiths, unconventional by majority standards.

More, tremendously more, is here involved—the right of the individual to select his own manner and means of treatment. The question is not, whether false and misleading statements were made to Claimant. The question is, what does he want to do about it? He says "Nothing,—I am satisfied. I am being helped." But the Government answers "we won't allow you to be satisfied. We won't allow you to help yourself. We know that you may be led into doing yourself harm, through relying too heavily on his machine, and thus not obtaining proper (by our standards) medical treatment." Without intending to give offense, I think no such proposition of paternal right in the field of public health has been advanced in modern times. At least I have been unable to find it in encyclopedias, treaties or law books.

Conclusion

An easy way of disposing of this case would have been to hold that the attempt to stretch the Government's power of seizure and condemnation under the commerce clause to an article in the hands of the ultimate consumer, raised grave constitutional questions which forbade such construction (Federal Trade Commission v. American Tobacco Company, 264 U. S. 298), but I have preferred to meet head-on and to discuss the questions of security of one's

dwelling and of personal liberty, which I regard as the true issues in the case. I have done this because I gained the impression during the war, [44] and the impression has been strengthened since hostilities ended, that it is time for Federal judges to dust off the Constitution.

Judgment will be for the Claimant.

Dated this 22nd day of May, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 22, 1946. [45]

[Title of District Court and Cause.]

OBJECTIONS TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the United States of America by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and objects to the proposed findings of fact and conclusions of law, and particularly to that portion of Paragraph V of the proposed findings of fact which state "and claimant does not consent to entry into his home for any purposes connected with this case" for the reason that the Court directed at the time of the trial that there would be no evidence heard on this issue. The following is taken from the transcript of testimony and proceedings:

"Mr. Goldstein: Q. Was this machine forcibly taken from you?

Mr. Patterson: The same objection.

A. Yes.

The Court: I think the seizure is an immaterial issue in this case, inasmuch as I have directed the machine to be returned."

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney. [46]

United States of America,
District of Oregon—ss.

I certify that on the 3 day of July, 1946, I placed in the mail a certified copy of the foregoing Objections to the Proposed Findings of Fact and Conclusions of Law, addressed to Mr. Barnett H. Goldstein, Failing Building, Portland, Oregon, having first placed thereon sufficient postage to carry the same to its destination.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed July 3, 1946. [47]

[Title of District Court and Cause.]

SUGGESTED CHANGES IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

It is respectfully suggested by the libelant that Paragraph V of the Findings of Fact be changed by deleting therefrom the following phrase: "and claimant does not consent to entry into his home for any purposes connected with this case."

HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

I, J. Robert Patterson, Assistant United States Attorney, certify that on the 24th day of July, 1946, I placed in the mail a certified copy of the Suggested Changes in the Findings of Fact and Conclusions of Law, addressed to Barnett Goldstein, Failing Building, Portland, Oregon, having first placed thereon sufficient postage to carry the same to its destinatoin.

/s/ J. ROBERT PATTERSON.

[Endorsed]: Filed July 29, 1946. [48]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause coming on regularly for trial before the Court, without a jury, the libelant appearing by J. Robert Patterson, Assistant United States Attorney for the District of Oregon, and Joseph L. Maguire, Attorney for the Federal Security Agency, and the claimant appearing in person and by his attorney, Barnett H. Goldstein, and a trial by jury having been waived, whereupon, certain facts having been stipulated, witnesses on the part of the libelant and claimant were duly sworn and examined, exhibits were introduced by the libelant, and both parties having rested, and thereafter a written opinion having been filed in addition to the previous memorandum opinion,

Now, Therefore, the Court makes and enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That this Court has jurisdiction of the article of device labeled in part "Spectro-Chrome" and accompanying labeling in the sense that the device and labeling are and at all times since the filing of the Information have been within the State and District of Oregon.

II.

That this action is brought by way of libel of

information for condemnation of the article of device labeled in part "Spectro-Chrome" and accompanying labeling pursuant to Section 334, Title 21, U.S.C. [49]

III.

That Dinshah shipped in interstate commerce from Newfield, New Jersey, via Railway Express Agency, on or about June 14, 1945, consigned to William R. Olsen, claimant herein, a carton containing an article labeled in part "Spectro-Chrome" consisting essentially of a cabinet equipped with an electric light bulb, an electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article was intended for use in the cure, mitigation, treatment and prevention of disease and to affect the structure and functions of the body of man, and containing an assortment of written, printed and graphic matter entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," 2 "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," 5 "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome — December 1941 — Scarlet," "Spectro-Chrome March 1945—Yellow," which relate to said article, and which contained statements and references to the curative and thera-

peutic value of said article in the cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man; that said carton containing said article and said items of written, printed, and graphic matter, constituting accompanying labeling within the meaning of al U.S.C. 321 (m), were received by said claimant at destination, Portland, Oregon, on or about June 25, 1945.

IV.

That said article is a device within the meaning of 21 U.S.C. 321(h) and when introduced into and while in interstate commerce its [50] label and labeling, described above, did contain, within the meaning of 21 U.S.C. 352(a), false and misleading statements regarding the capability of the device in measuring and restoring human radio-active and radio-emanative equilibrium and false and misleading statements of claims for said device when used as directed in affecting the structure and functions of the body of man and of its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of diseases, conditions, symptoms and disorders of man.

V.

That the article of device labeled in part "Spectro-Chrome" and accompanying labeling are

not inherently dangerous, and claimant does not consent to entry into his home for any purposes connected with this case.

VI.

That the claimant, William R. Olsen, is more than 21 years of age; that he makes his home and lives with his parents at 7425 S. Insley Street; that the said article of device labeled in part "Spectro-Chrome" and accompanying labeling were purchased and acquired by him for the sole and exclusive use of himself and the immediate members of his family, and for none other, and at all times were kept in his home and in his possession for said purpose with no intention now or at any time in the future to transport, sell or use said machine for any commercial purpose whatsoever.

VII.

That the said claimant and his mother have been helped in the treatment of their bodily ailments by the use of said machine and are satisfied therewith.

From the foregoing Findings of Fact, the Court does hereby make [51] and enter the following Conclusions of Law:

Conclusions of Law

I.

That libelant is not entitled to an order or writ of this Court directing the seizure of the device and accompanying labeling from claimant's dwelling without the consent of claimant, and claimant

would be and is entitled to resist the execution of said writ by force.

II.

That claimant and members of his family are entitled to use the device and accompanying labeling for treatment of their bodily ailments, without interference by writ or order of this Court, and without interference by libelant or its agents.

IIa.

That the machine and accompanying labeling at all times while in the home of the said claimant were not being transported or about to be transported or intended to be transported in interstate commerce; were not in the course of interstate commerce and had passed beyond interstate commerce channels and were exclusively within the home and possession of the claimant for his own use with no intention of transporting or selling the same, and that therefore no interstate transportation is or has at any time been involved in this case.

III.

That claimant is entitled to judgment dismissing the libel and adjudging and confirming the return of the article of device and accompanying labeling.

Dated this 1st day of August, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 1, 1946. [52]

In the District Court of the United States
for the District of Oregon

Civil No. 2855

UNITED STATES OF AMERICA,

Libelant,

vs.

One article of device labeled in part "SPECTRO-CHROME" and accompanying labeling; WILLIAM R. OLSEN,

Claimant.

JUDGMENT

The above entitled cause having been tried by the Court without a jury and the Court having heretofore made and entered Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered and Adjudged that the petition of the Libelant for the condemnation of the aforesaid article of device labeled in part "Spectro-Chrome" and accompanying labeling be, and the same is hereby, denied, and the libel is dismissed.

It Is Hereby Further Ordered and Adjudged that return of the said article of device labeled in part "Spectro-Chrome" and accompanying labeling to the Claimant herein, William Ray Olsen, is adjudged and confirmed.

Dated this 1st day of August, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 1, 1946. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William R. Olsen, Claimant as above named, and Barnett H. Goldstein, his attorney.

You and each of you will please take notice that the libelant, United States of America, appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment in the above-entitled cause made and entered the first day of August, 1946, by the Honorable Claude McColloch, Judge of the above-entitled Court, wherein the claimant recovered judgment denying the petition of the libelant for condemnation of the above-mentioned article of device labeled in part "Spectro-Chrome" and accompanying labeling and further dismissing the libel and further ordering and confirming the return of the said article of device labeled in part "Spectro-Chrome" and accompanying labeling to the claimant, William Ray Olsen.

HENRY L. HESS,
United States Attorney for the District of Oregon.

By /s/ J. ROBERT PATTERSON,
Assistant United States Attorney. [54]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Notice of Appeal on the Claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 2nd day of August, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for William Ray Olsen, Claimant.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed Aug. 2, 1946. [55]

At a Stated Term, to wit: The October Term 1945, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the ninth day of August, in the year of our Lord one thousand nine hundred and forty-six.

Present: Honorable Francis A. Garrecht,
Senior Circuit Judge, Presiding,
Honorable William Healy, Circuit Judge,
Honorable William E. Orr, Circuit Judge.

No. 11403

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM R. OLSEN, Claimant of one article of device labeled in part "SPECTRO-CHROME", and accompanying labeling,
Appellee.

ORDER STAYING PORTION OF JUDGMENT OF DISTRICT COURT PENDING APPEAL

Upon consideration of the petition of the United States of America, for an order staying a portion of the judgment entered in this cause by the District Court of the United States for the District of Oregon on August 1, 1946, pending determination

of the appeal herein heretofore taken by the appellant, and good cause therefor appearing,

It Is Ordered that the portion of the said judgment of the said District Court in the following words:

> "It is hereby further ordered and adjudged that return of the said article of device labeled in part 'Spectro-Chrome' and accompanying labeling to the Claimant herein, William R. Olsen, is adjudged and confirmed."

be, and hereby is stayed pending the disposition of the appeal herein. [56]

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of August, 1946.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Aug. 12, 1946.

In the District Court of the United States
for the District of Oregon

Civil No. 2855

UNITED STATES OF AMERICA,

Libelant,

vs.

One article of device labeled in part "SPECTRO-CHROME and accompanying labeling WILLIAM R. OLSEN,

Claimant.

ORDER

This Matter coming on to be heard before the undersigned Judge of the above-entitled Court on the motion of the libelant to extend the time to and including the 31st day of October, 1946, within which to file the record on appeal and docket the action, and it appearing to the Court that there is good cause and that it is proper to grant the extension of time, and the Court being fully advised, It Is Therefore Ordered that the libelant be, and it is hereby, granted an extension of time to and including the 31st day of October, 1946, within which to file the record on appeal and docket the action.

Dated at Portland, Oregon, this 9th day of September, 1946.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Sept. 9, 1946. [57]

[Title of District Court and Cause.]

ORDER

This Matter coming on to be heard upon the motion of the libelant and it appearing to the Court that a notice of appeal has been filed in the above-entitled case; and it further appearing that it is necessary that the exhibits which were entered and made a part of the record in this trial be forwarded to the Circuit Court of Appeals for the Ninth Circuit to be considered along with the record on appeal, the Court being fully advised;

It Is Therefore Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all of the exhibits which are enumerated as Libelant's Exhibits 1 through 17, inclusive, these being the entire number of exhibits which were introduced and received and made a part of the record in the District Court.

Dated at Portland, Oregon, this 27th day of September, 1946.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Sept. 27, 1946. [58]

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

July 26—Entered order to file libel. Fee.

July 26—Filed libel.

July 26—Filed and entered order for process. Fee.

July 26—Filed praecipe U. S. Atty. for two cert. copies above order.

July 27—Issued warrant of seizure and monition—to marshal.

July 27—Issued 2 cert. copies Order—to marshal.

July 31—Filed warrant of seizure and monition, with marshal's return.

Aug. 17—Filed affidavit of publication.

Aug. 31—Filed appearance and answer of claimant.

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Feb. 20—Filed motion of U. S. Atty. for order for marshal to deliver part of device to F. & D. Adm.

Mar. 4—Entered order continuing motion of ptff. for scientific examination of colored slides to March 11, 1946 and order continuing another motion (to be filed) to same date. McC.

Mar. 4—Filed motion for order directing claimant to file stipulation for costs.

Mar. 4—Entered order resetting for pre-trial conference on March 11, 1946. Attys. notified McC.

Mar. 11—Record of hearing on motion of U. S. to detach slides and make scientific examination and on motion for order directing

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claimant to file stipulation for costs; argued and taken under advisement and order allowing 10—10 and 5 days for briefs. McC.

Apr. 4—Filed opinion of Judge McColloch.

Apr. 4—Entered order denying motion of U. S. to detach slides and make scientific examination. McC.

Apr. 16—Entered order setting for trial on May 21, 1946—10 a.m. McC.

Apr. 23—Filed motion to quash warrant, etc.

Apr 24—Filed plaintiff's memorandum (sub. to J. McColloch).

Apr. 24—Filed motion of ptff. for summary judgment.

Apr. 25—Entered order setting hearing on ptff's. motion for summary for May 21, 1946—10 a.m. attys. notified. McC.

Apr. 29—Entered record of hearing on claimants motion to quash, to restore seized articles to claimant and to dismiss proceedings; argued and order entered that seized articles be returned forthwith to claimant. McC.

May 1—Filed affidavits of Wm. Rickard and David J. Holliday.

May 1—Filed petition of U. S. for order to produce Spectro-Chrome.

May 2—Filed praecipe, U. S. atty., subpoenas.

May 2—Issued subpoenas—to marshal.

May 2—Lodged order directing marshal to restore seized machine (not signed).

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May 8—Filed application of libelant for pretrial conference.

May 14—Filed (3) subpoenas with marshal's return.

May 15—Filed Stipulation. [59]

May 17—Filed memorandum of law.

May 18—Filed subpoena.

May 20—Filed telegram from Irene Grace Dinshah Ghadiali.

May 20—Filed telegram from Dinshah P. Ghadiali.

May 20—Filed air mail letter (unopened) from Irene Grace Dinshah.

May 21—Entered order denying motion of ptff. that claimant produce device at trial; order denying motion for summary judgment; record of trial before court and order taking under advisement. McC.

May 22—Filed written opinion. McC.

May 22—Entered order to prepare judgment. Notice to attys. McC.

May 24—Filed (2) subpoenas with returns.

May 24—Entered order setting hearing on proposed Findings of Fact, Conclusions of Law and Judgment for June 25, 1946. Attys. notified. McC.

May 25—Entered record of hearing on proposed Findings, Conclusions and Judgment. McC.

July 3—Filed objections to the proposed findings of fact and conclusions of law.

July 29—Filed suggested changes in the Findings of Fact and Conclusions of Law.

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Aug. 1—Filed and entered Findings of Fact and Conclusions of Law. Attys. notified. McC.

Aug. 1—Filed and entered Judgment (dismissing) attys. notified. McC.

Aug. 2—Filed notice of appeal by U. S. Atty.

Aug. 2—Filed praecipe of U. S. Atty. for copy of above.

Aug. 2—Issued cert. copy notice of appeal to Asst. U. S. Atty.

Aug. 2—Filed praecipe, U. S. Atty., 4 cert. copies Judgment.

Aug. 2—Issued 4 cert. copies Judgment—to U. S. Atty.

Aug. 12—Filed copy of order staying return of spectro-chrome to Olsen.

Aug. 23—Filed arguments in re findings etc. June 25, 1946.

Sept. 9—Filed motion with affidavit for order allowing to and inc. Oct. 31, 1946, to file record on appeal.

Sept. 9—Filed and entered order allowing to and inc. Oct. 31, 1946, to file record on appeal. McC.

Sept. 27—Filed and entered order to send exhibits to Circuit Court of Appeals. McC.

Oct. 11—Filed designation of record.

Oct. 11—Filed transcript of hearing dated April 29, 1946.

Oct. 11—Filed transcript of testimony and proceedings dated May 21, 1946.

Oct. 11—Filed transcript of arguments in re findings, etc. dated June 25 (carbon copy).

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the District Court of the United States for the District of Oregon:

Libelant-appellant designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of the above-entitled case, it being the libelant-appellant's intention to designate the entire and whole record:

1. Libel of Information.

2. Order of July 26, 1945, allowing libel to be filed.

3. Order of July 26, 1945, directing that process issue and directing publication.

4. Warrant of seizure and monition.

5. Marshal's return of service of the writ.

6. Affidavit of publication.

7. Appearance and answer of claimant.

8. Motion to make scientific examination of slides.

9. Motion for order directing claimant to file stipulation for costs.

10. Order of March 11, 1946, reserving decision on Libelant's Motion.

11. Memorandum Opinion of Judge McColloch dated April 4, 1946.

12. Order of April 4, 1946, denying Libelant's Motion to detach glass slides.

13. Order setting case for trial.

14. Claimant's Motion to Quash Warrant, restore seized article to claimant, and to dismiss libel.

15. Affidavit of William R. Olsen, claimant.

16. Libelant's Motion for Summary Judgment.

17. Order dated April 29, 1946, directing seized articles to be restored to claimant.

18. Affidavit of William Rickard, Deputy Marshal, and affidavit of David J. Holliday.

19. Petition for order directing claimant to produce the seized device and accompanying labeling.

20. Application for Pre-Trial Conference.

21. Stipulation between libelant and claimant.

22. Order denying Motions dated May 21, 1946.

23. Judge McColloch's Opinion dated May 22, 1946.

24. Libelant's objections to proposed Findings of Fact and Conclusions of Law.

25. Suggested changes in the Findings of Fact and Conclusions of Law.

26. Findings of Fact and Conclusions of Law.

27. Judgment.

28. Notice of Appeal.

29. Order of Circuit Court of Appeals for the

Ninth Circuit dated August 9, 1946, staying return of device to claimant.

30. Order extending time to docket the appeal and file transcript on appeal.

31. Order directing Clerk to forward exhibits.

32. Transcript of Pre-Trial proceedings.

33. Transcript of trial proceedings.

34. Transcript of hearings on Findings of Fact and Conclusions of Law.

35. Designation of Record (D. C.).

Dated this 11th day of October, 1946.

HENRY L. HESS,
United States Attorney
for the District of Oregon,

/s/ J. ROBERT PATTERSON,
Asst. United States Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Designation of Record on the Claimant-Appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the 11th day of October, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett

H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for Claimant-Appellee.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed Oct. 11, 1946. [63]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 64 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 2855, in which the United States of America is Libelant and Appellant, and William R. Olsen is Claimant and Appellee; that the said transcript has been prepared by me in accordance with the designation of the contents of the record on appeal filed by the Appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that there is enclosed with this

transcript of record on appeal, transcript of hearing dated April 29, 1946, transcript of testimony and proceedings dated May 21, 1946, transcript of proceedings dated June 25, 1946, and exhibits Nos. 3 to 17 inclusive filed in this cause.

I further certify that exhibits Nos. 1 and 2, Spectro-Chrome machines, went forward by express, October 21, 1946.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 22nd day of October, 1946.

[Seal] LOWELL MUNDORFF,
Clerk,

By /s/ F. L. BUCK,
Chief Deputy. [64]

In the District Court of the United States
for the District of Oregon

Civil No. 2855

UNITED STATES OF AMERICA,
Libelant,

vs.

One Article of Device Labelled "SPECTRO-CHROME" and accompanying labeling; and WILLIAM RAY OLSEN,
Claimant.

Portland, Oregon, Monday, April 29, 1946

10:10 o'clock a. m.

Before: Honorable Claude McColloch, Judge.

Appearances:

Mr. J. Robert Patterson, Assistant United States Attorney, appearing for the Libelant.

Mr. Barnett H. Goldstein, Attorney for the Claimant.

Alva W. Person, Court Reporter.

TRANSCRIPT OF PRE-TRIAL PROCEEDINGS

The Court: You have a motion to quash, Mr. Goldstein?

Mr. Goldstein: Yes, your Honor. Mr. Patterson is here. May I proceed?

The Court: Yes, briefly.

Mr. Goldstein: If the Court please, in this matter of the United States of America vs. One Article of Device Labeled "Spectro-Chrome"——

Mr. Patterson: Excuse me. If your Honor please, I would like to have Mr. McGuire, from Washington, of the Federal Security Agency, sit here during the argument of the motion. He is an attorney, your Honor.

The Court: What branch?

Mr. Patterson: The Federal Security Agency.

The Court: I know. I never heard of it before. That is a new department in the Government?

Mr. Patterson: No, it is not. The Federal Security Agency is under the Department of Agriculture.

The Court: That is what I want to know.

Now, Mr. Goldstein.

Mr. Goldstein: If the Court please, in this case, as was previously pointed out, the issue involved is the right of the Government to seize this article from the possession of the private citizen. In accordance with the Admiralty laws the answer was filed and the case is now at issue.

However, I have made every effort I could, and I [2*] trust I may be permitted to digress a moment to call attention to the fact that while the Government plainly intends to make this a test case, and one that, if unsatisfactory to the Government's position, would undoubtedly go to the Circuit Court of Appeals and possibly to the Supreme Court of the

* Page numbering appearing at top of page of original Reporter's Transcript.

United States, the claimant is in no financial position to meet this unequal contest, and so in view of my contention that so far as we are concerned we are raising no question as to the merits of the machine itself but merely depending and relying upon the Constitutional rights guaranteed to us by the Constitution. I think the legal question, if passed upon by this Court, would enable the Government to prosecute any appeal, if it is unsatisfactory to them, to any court they want and we will meet them on that Constitutional ground, and we are in no position to meet them on any question where it would involve the testimony over a period of weeks of time, as indicated by a previous hearing of experts called by the Government, and with unlimited expense, to testify as to the curative value or lack of curative value of this machine. We are in no position to meet that contest.

And so, in view of the position we take, in view of the willingness to concede that, regardless of what the Government may claim as to its curative value or lack of curative value, we contend on the face of the record, as it now stands, in view of the affidavit that has been filed setting up the [3] facts of the seizure and the manner of the seizure, and that no counteraffidavit has been filed, that so far as the factual situation is concerned it stands undisputed and so we feel the matter, which I hope the Court may be able to pass upon and decide, and if unfavorable to us we are through. In other words, we have given the Government a 90-dollar machine; they can do with it as they please; but if the Court's

decision is favorable to our position the Government can take an appeal. They can raise the question, and it would not involve claimant in any unusual expense as it would if we had a trial of some two or three weeks' duration and listening to the testimony of doctors sent from Chicago and all over the country to testify as to the failure of the machine to do the things that the original inventor or original manufacturer claimed. And this man is not claiming to anybody except to himself and his conscience, and he filed the motion to quash the warrant that has been issued directing that this machine be taken from this man's private home, which warrant was perfunctorily issued by the Clerk pursuant to a complaint or libel filed by the United States Attorney, supported by his own affidavit, which, on the face of it, is an affidavit without any personal knowledge of himself and based upon information of others, and, secondly, is not supported by the type of averment that is necessary to secure the issuance of a search warrant, as required by our Constitution, and we are asking [4] that the warrant that was issued be quashed and the machine be restored to us that was improperly and illegally seized, and the libel be dismissed.

And in support of that I have filed a brief memorandum, setting forth three specific grounds on which we claim the Court would be absolutely justified in quashing the warrant restoring the seized article to the claimant and dismissing the libel proceedings, because, as stated, the affidavit sets forth the fact that this young man, an adult person about twenty-

two years of age, and who is making a bare livelihood supporting himself and his invalid mother in a private home, bought a machine called a "Spectro-Chrome," that he paid for it, is using it in his private home for his own purposes, not with the intention of using it on others or transporting it in interstate commerce. Of course, we understand that it is the contention that this machine was shipped in interstate commerce or was in the course of interstate commerce, and we contend in the very first instant, without any denial, or any affidavit or dispute, that the Court has no jurisdiction over property where no transportation was involved at the time of the seizure.

In 11 American Jurisprudence 18, wherein the text reads, "The regulatory power of Congress over interstate commerce does not attach until such intercourse begins, and conversely the power of Congress ceases when interstate commerce [5] ends."

In the case of United States v. 2 Bags, 54 Fed. Supp. 706, a libel proceeding in the Federal Court, the opinion reads:

"The label of the product must be tested by its condition at the time of seizure"; and the time of seizure was long past the time when interstate commerce had ended.

Here reading further, "The Court should not determine that it is contraband merely because of the possibility that it might be used subsequently to deceive." And that is the only theory upon which the Government can claim its seizure, that it is

contraband and therefore subject to seizure wherever they can find it.

Then reading further from the opinion, "In other words, the inference is that the seizure must be made while the article or device is apt to be transported in interstate commerce, or in the course of interstate commerce, but in reality has passed beyond interstate commerce channels and is exclusively within the possession of a private individual for his own use, with no intention of transporting same or selling same."

I am quoting the words of a Court that passed upon the same situation as here.

The Court: I am not going to let the Government go into a private home and take this device away like they did, any more than I would let them go in there and break down a door, or threaten to go in and break it down and take a bottle of [6] Dr. Carter's Little Liver Pills, or contraceptives, for another example. Somebody else can do that if they want to, either of equal rank or superior rank, but I am not going to hold it, and I have known I wasn't going to hold it ever since I heard the statement of the Government's case. Nevertheless, if they want to make a test case of this they are going to be permitted to do so. I realize the difficulties made for the claimant as well as for me, and I have a solution of it. If the Government wants to bring a large number of witnesses here, as I understand is their plan, to make a record, I will make a reference. You don't need to attend, if you don't want to. I don't expect to attend, be-

cause I have got other things to do, and then I will hear, before the case is closed, the testimony which I consider is material from my point of view, namely, what the claimant has to say, which has so far not been denied, as to the circumstances under which the entry was made into the home and as to the uses the claimant and his family were making and intend to make of the machine. That will simplify your problem, and it will be in accord with established practice.

Mr. Goldstein: Did I understand your Honor to say it had been denied by the Government?

The Court: What had been denied?

Mr. Goldstein: About the matter of entry.

The Court: No, I didn't say that. [7]

Mr. Goldstein: Because there is no counter-affidavit filed, because I assume it is admitted.

The Court: I can't decide this case on affidavits. This is a lawsuit under Federal rules, which, like any other lawsuit, has to be decided on testimony of witnesses. It can't be decided by affidavit.

Mr. Goldstein: May I make a suggestion?

The Court: I can't give it a week or two weeks. I will make a reference.

Mr. Goldstein: The case is set for trial the 21st of May, which is satisfactory, but I have a case set for the 22nd of May in Kelso, Washington. There is no jury involved. Could we continue it so it won't interfere with my trial date there? Otherwise it places me in an awkward predicament.

The Court: I don't know. You and Mr. Patterson will have to decide that.

Mr. Patterson: There is some testimony about certain procedures. I should think we could have testimony taken next Monday, before it is necessary that the Government go to the merits of the case and expend fifteen or twenty thousand dollars in bringing witnesses to produce out here on the merits of the case.

The Court: Mr. Patterson, you are asking me to split up a case and try it on one issue——

Mr. Patterson: No. [8]

The Court: Wait a minute. Hear me through. Mr. Goldstein would like to have me do that for his own reasons; you would like to have me do it, and I am not going to do it for my own reason.

Mr. Patterson: No. If the Court overrules the motion——

The Court: I am not going to overrule the motion. I just told you it was a case where we could not do that. That means a search and seizure will be decided on the testimony made from the witness chair. I am going to make a reference, so I will have to make it to a Master. You make a record and I will read the record and hear argument.

Now meanwhile, Marshal, I direct you to return the machine today to the home from which your office took it, forthwith.

Deputy U. S. Marshal Meyer: Yes, sir.

Mr. Patterson: Now, if your Honor please, I would like to move the Court for an order setting the Court's order aside, directing the return of the machine, pending an appeal.

The Court: An appeal from what?

Mr. Patterson: Oh, from the Court's order. What is the basis of returning the machine, your Honor, may I inquire? Are you sustaining Mr. Goldstein's motion to quash the warrant? Are you setting aside the other Court's order, or how? I just don't quite understand the procedure as to the return of the machine. It is now under seizure on the Court's order. [9]

The Court: Oh, yes.

Mr. Patterson: Is that order set aside?

The Court: Well, you figure that out.

Mr. Hess, where is your opponent?

(The Court and Mr. Hess here conversed.)

Mr. Patterson: During the indulgence of the Court may I say a few words?

The Court: Wait until I finish here.

Mr. Patterson: Yes.

(Short pause, the Court and the Clerk conversing.)

The Court: Now, Mr. Patterson.

Mr. Patterson: Yes. If the Court please, this case of the "Spectro-Chrome" is an action against an article itself, and if the Court orders that the machine be returned there would be no proceeding, if that is the Court's order, that the libel be dismissed. This is an action in rem against the machine itself, and if your Honor is directing that the machine be returned and the attachment is dissolved, that finishes it, if that is the Court's order. I would like to know that. I think the Government

is entitled to know this. We don't proceed against this machine as a test case. This machine was proceeded against in the other trial and declared contraband by a jury.

The Court: Now cut that out. I don't want to hear any more about that trial. When we have proceedings against [10] ship down here at the dock we don't bring it in the courtroom.

Mr. Patterson: But it has to be under attachment or under Court order.

The Court: Just because this machine goes back to the home it does not cease to be a proceeding in rem. The machine is not going out of the jurisdiction of the Court.

Now do any of you other gentlemen have something?

(There were no further proceedings in the foregoing case had on this day.) [11]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand the proceedings had in the above-entitled cause before the Honorable Claude McColloch, Judge, on Monday, April 29, 1946; that I thereafter reduced by shorthand notes of said proceedings had into typewriting, and the foregoing transcript, pages numbered 1 to 11, both inclusive, contains a full, true and correct record of the pro-

ceedings had upon said date in the above-entitled cause.

Dated at Portland, Oregon, this 29th day of April, A.D. 1946.

/s/ ALVA W. PERSON,
Court Reporter.

[Title of District Court and Cause.]

PROCEEDINGS

Portland, Oregon, Tuesday, May 21, 1946

10:00 o'clock a. m.

TRANSCRIPT OF TRIAL

Mr. Patterson: The Government is ready, your Honor.

Mr. Goldstein: The claimant is ready, your Honor. [1*]

Mr. Patterson: I would like to have permission to have Mr. Moulton sit here during the trial. He is the head of the Food and Drug Administration in Portland and has had a lot to do with the investigation of the case.

The Court: All right. Call a witness.

Mr. Patterson: If your Honor please, before calling any witnesses, I would like to again urge upon the Court the Government's motion to apply to the Court for an order directing William Ray

* Page numbering appearing at top of page of original certified Transcript of Record.

Olsen to produce the machine for the purposes of this trial.

The Court: The motion is denied.

Mr. Patterson: Does your Honor care to also rule on the Government's motion for summary judgment at this time?

The Court: Motion denied.

Mr. Patterson: Has there been any ruling on the claimant's motion to quash the warrant, restoring the seized articles to the claimant and dismissing the libel proceeding?

The Court: That question becomes moot with the disposition of the other motions.

Mr. Patterson: If your Honor please, we have two of the machines which we wish to bring up from the office. It will take just a few minutes to bring them up.

In order to save time, I wish at this time to read into the record the stipulation which has been entered into between the claimant and the Government. [2]

The Court: That won't be necessary. If you want it in the record, the reporter can copy it in.

Mr. Patterson: All right. As I understand, that will be in the record, though.

The Court: If you wish it.

Mr. Patterson: Yes, I do.

The Court: It may be copied in at this place.

Mr. Patterson: All right.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated in the above-captioned case by and between the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and the claimant herein, William R. Olsen, and by his attorney, Barnett Goldstein, subject to the reservations hereinafter set forth, that the following are admitted as facts as though the same were developed by testimony from witnesses under oath in open court to apply in the determination of issues joined, and which, if competent, material and relevant thereto, are to be taken as [3] facts binding upon the parties hereto and named above.

That Dinshah shipped in interstate commerce from Newfield, New Jersey, via Railway Express Agency, on or about June 14, 1945, consigned to William R. Olsen, claimant herein, a carton containing an article labeled in part "Spectro-Chrome" consisting essentially of a cabinet equipped with an electric light bulb, and electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article was intended for use in the cure, mitigation, treatment and prevention of disease and to affect the structure and functions of the body of man, and containing an assortment of written, printed

and graphic matter entitled in part "Spectro-Chrome Home Guide", "Favorscope for 1945", "Rational Food of Man", "Key to Radiant Health", 2 "Request for Enrollment as Benefit Student", "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer", 5 "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request", "Certificate of Benefit Studentship", "Spectro-Chrome — December 1941 — Scarlett", "Spectro-Chrome March 1945—Yellow", which relate to said article, and which contained statements and references to the curative and therapeutic value of said article in cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and [4] functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man; that said carton containing said article and said items of written, printed, and graphic matter, constitutiong accompanying labeling within the meaning of 21 U.S.C. 321 (m), were received in interstate commerce by said claimant at Portland, Oregon, on or about June 25, 1945.

That said article is a device within the meaning of 21 U.S.C. 321 (h) and when introduced into and while in interstate commerce its label and labeling, described above, did contain, within the meaning of 21 U.S.C. 352 (a), a number of false and misleading statements regarding the capability

of the device in measuring and restoring human radio-active and radio-emanative equilibrium and false and misleading statements of claims for said device when used as directed in affecting the structure and functions of the body of man and of its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of diseases, conditions, symptoms and disorders of man.

It is understood and agreed that the claimant, by the admissions and stipulations herein contained, does not admit that the same are competent, material or relevant herein, by reason of the following contentions of the claimant, which are [5] factually denied by the Government:

(1) That the court has no jurisdiction over the subject matter of this proceeding, in that, the device, at the time of its seizure from the home of the claimant, was not then being transported or was in the course of interstate commerce, but that it had passed beyond interstate commerce channels and was within the private home and in the exclusive possession of the claimant, with no intention of transporting, selling or otherwise disposing of same, but was acquired, used and intended to be used for the personal use and benefit of the claimant and members of his family, and for no other person or persons, and as so used, in the home of said claimant, it was not labelled within the meaning of the Food, Drug and Cosmetic Act.

(2) That the seizure of said article from the

claimant's home at the time and under the conditions and circumstances alleged by claimant, was illegal and in direct violation of the constitutional rights of said claimant, and that the taking of said personal property from the home of and belonging to said claimant was and would be without due process of law.

That only as to said matters, both parties hereto reserve the right to present testimony in support of and in opposition thereto.

Dated at Portland, Oregon, this 6th day of May, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon. [6]

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney,

/s/ BARNETT GOLDSTEIN,
Attorney for Claimant,

/s/ WILLIAM R. OLSEN,
Claimant.

Mr. Patterson: If your Honor please, I would like to have this machine marked.

The Court: Bring it up.

("Spectro-Chrome" machine thereupon marked Libelant's Identification No. 1.)

Mr. Patterson: If your Honor please, a witness

was subpoenaed to appear here today at this trial in order to identify the device which has been marked as Government's Exhibit 1. I wonder at this time whether the Claimant has any objection as to whether this is or is not a bona fide "Spectro-Chrome" machine, produced and manufactured by the Dinshah Spectro-Chrome Institute, Malaga, New Jersey?

Mr. Goldstein: In view of the Claimant's position, that all this is irrelevant and immaterial, we cannot very well accede to counsel's request.

I wish to call attention to the fact that a stipulation between the parties has already been entered in the record, made a part of the record, as I understand it, and that the issues are confined to two or three simple legal questions [7] and one involving the matter of procedure. So far as the other matters are concerned, in connection with the machine itself, they are not in issue at the present time, and, therefore, we object to the introduction of any exhibits that have nothing to do with the case.

The stipulation specifically says "That only as to said matters, both parties hereto reserve the right to present testimony in support of and in opposition thereto." By the stipulation, we are not permitted to introduce any evidence at this time.

Mr. Patterson: If your Honor please, this is an action in rem against the machine itself and, in view of your Honor's ruling that the original machine and the literature that was seized would not be required to be produced before the Court at the

time of trial, I felt that, in order to preserve the Government's right to appeal, if there was an appeal, there should be something in the record, to become a part of the record so that the appellate court would know what we are proceeding against.

The Court: Mr. Maguire, can you identify that machine as similar to the machine involved?

Mr. Maguire: Yes, I can.

The Court: You can come up here and be sworn and identify it in your own words. [8]

JOSEPH L. MAGUIRE

was thereupon produced as a witness on behalf of the Libelant and, being first duly sworn, testified as follows:

The Court: State in your own way—make a statement in your own way, so as to make the record complete, subject to cross examination.

Mr. Goldstein: Merely for the purpose of the record, your Honor, may the record show that Claimant objects to the proposed testimony that is about to be submitted by Mr. Maguire, on the ground, first, it is incompetent, irrelevant and immaterial, and not binding upon the Claimant; and, second, upon the ground that the stipulation of the parties, which has already been entered into and made a part of this record, confines the issues to be presented at this trial, and this testimony is outside the scope of those issues.

The Court: To the extent that it may be outside

(Testimony of Joseph L. Maguire.)

the stipulation—I don't know that it is—the Govment is relieved of the stipulation. Now, go ahead, Mr. Maguire.

A. I have seen a number of "Spectro-Chrome" machines, both of the model that has been marked as Government's Identification No. 1——

The Court: You had better identify yourself for the record, first. What is your official position?

A. I am an attorney with the Federal Security Agency, assigned to the Food and Drug Division, General Counsel's office. [9]

As I said, I have seen a number of "Spectro-Chrome" machines, both of the type or model that has been marked as Government's Identification No. 1, also of the type that is also present in court, being a wood model, such model being——

The Court: Mark that one also. Is that the wood model that you refer to? A. Yes.

The Court: Let's mark that No. 2.

("Spectro-Chrome" machine, wood model, was thereupon marked Libelant's Identification No. 2.)

A. A machine similar to Government's Identification No. 2 was the subject matter of a seizure trial in the Eastern District of New York just a year ago this time——

Mr. Goldstein: That is objected to as being hearsay, and is incompetent, irrelevant and immaterial, and not binding upon the claimant.

The Court: You may continue, subject to the objection.

(Testimony of Joseph L. Maguire.)

A. At that trial—prior to that trial, there was a pre-trial conference and a pre-trial order signed, a copy of which I have in my file here. One of the items in the pre-trial order was an admission by the claimant in that action who testified on the trial that he was the inventor of the machine and the originator of "Spectro-Chrome" Metry; that all machine that he had manufactured since the early 20's through to the present time are substantially the same. [10]

Mr. Goldstein: In order that the record may be preserved, in so far as the Claimant's rights are concerned, may we have an understanding now, so I won't have to object any further, that the objection of the Claimant goes to all of this line of testimony, that it is incompetent, irrelevant and immaterial in so far as the Claimant is concerned?

The Court: It is so understood.

A. The unqualified admission on the part of the inventor, Dinshah Ghadiali, was that the theory behind his so-called science and the machines from the time of their initial manufacture in the early 20's through to the present was substantially the same; that although the models and forms of the machines have changed from time to time, the theory behind the Spectro-Chrome Metry has been the same, and the substance of the machines themselves, in that, in particular, only the rays of the visible spectrum emanate from the machine, and that includes machines of any and all models.

(Testimony of Joseph L. Maguire.)

Mr. Patterson: Q. These machines, Mr. Maguire, are identified by serial numbers?

A. That is correct, and I may say as to these two exhibits, which have been marked for identification here, they are in inviolate in that the cells of the semaphores, that part of the machine that contains the slides are still intact.

The Court: Which one of these is like the device in this case? [11]

A. I don't know, your Honor, that I have ever seen the device that was seized in this particular case. I do know from the record that the serial number of the machine that was seized is probably only about 17 away from the serial number of the machine that has been marked——

The Court: No. 1?

A. ——No. 1, yes.

Mr. Patterson: That is all.

The Court: Do you want to state how many have been sold throughout the country?

A. I am quite sure I don't know, your Honor.

The Court: I thought you wanted to tie up your numbers there.

A. I might say that the serial number of this machine, Government Identification No. 1, is BF-8979 and, if I am not mistaken, the machine that was seized in this case on trial was No. 8962.

The Court: Are there further questions?

Mr. Paterson: No, your Honor.

Mr. Goldstein: No, your Honor.

Mr. Patterson: That is all.

(Witness excused.)

Mr. Patterson: At this time, we will offer Government's Exhibits 1 and 2 in evidence and also the literature——

Mr. Goldstein: Objected to as incompetent, irrelevant and immaterial, not binding upon the Claimant and not within the [12] issues permitted under the stipulation.

Mr. Patterson: The literature which I also offer, and which has not been marked as yet, consists of copies of the literature that was seized in this case, and that may be read if the Court desires it, to show that they are the same as the literature that was seized. This has been made necessary because of the fact that the literature that was seized is not before the Court at this time.

While some of the copies are identical as to printed matter, there are some typewritten notations and also addresses of other people that are not identical with the seized literature, but, as far as the printing is concerned, it is identical. We will offer these in evidence.

The Court: They are admitted, subject to the objection of counsel.

Mr. Patterson: Perhaps the record should show what each exhibit is.

The Court: All right. Take the time to number them now. The machines are numbered 1 and 2.

(The following articles and items of printed matter were thereupon received in evidence and marked as follows:

Libelant's Exhibits

No. 1 "Spectro-Chrome" machine.

No. 2 "Spectro-Chrome" machine, wooden model. [13]

No. 3 Booklet entitled "Spectro-Chrome Home Guide, by Dinshah P. Ghadiali, Originator of Spectro-Chrome Metry" (Fifth Edition).

No. 4. Booklet "Favorscope for 1945, for Spectro-Chrome Metry".

No. 5 Pamphlet "Rational Food of Man. A concise exponence by Dinshah."

No. 6 Pamphlet "Spectro-Chrome, Dinshah. 1 cent a day—keeps doctors away! Key to Radiant Health".

No. 7 Request for enrollment as benefit student, Dinshah Spectro-Chrome Institute.

No. 8 Auxiliary Benefit Notice. Dinshah Spectro-Chrome Institute.

No. 9 Free guidance request. Spectro-Chrome General Advice Chart.

No. 10 Certificate of Benefit Studentship issued to Lewis Ervin Schaeffer, Bath, Pa., dated April 27, 1945, signed Irene Grace Dinshah, Secretary, Dinshah Spectro-Chrome Institute.

No. 11 Constitution and by-laws Dinshah Spectro-Chrome Institute.

No. 12 Pamphlet. Vol. 21, Number 3, Spectro-

Chrome, March 1945 "United States Food and Drug Administration Inspectors Running All Over the Country to Condemn Spectro-Chrome at Forthcoming Trial."

No. 13 Pamphlet "Authentic Report of $250,000 Conflagration" Dinshah Spectro-Chrome Institute, Malaga, N. J.

No. 14 Notice of Planet Meeting Places, Dinshah Spectro-Chrome Institute.

No. 15 Pamphlet in re: Spectro-Chrome Metry Encyclopedia by Col. Dinshah P. Ghadiali, originator, Spectro-Chrome Metry. [14]

No. 16 Pamphlet "Life Sketch of the Originator of Spectro-Chrome Metry".

No. 17 Spectro-Chrome Irradiation. Free Guidance for the Service of Mankind. Dinshah Spectro-Chrome Institute. To Cora E. Wotring, RFD 1, 344 Spruce, Coplay, Pa., May 18, 1945.

Mr. Patterson: As I understand, these are all received in evidence, subject to the Claimant's objection.

The Court: Yes. During the noon recess, if you will show Mr. Goldstein the ones that you think are identical with the ones that his client received, and which have been returned to him. I am sure he will stipulate with you on that.

Do you want to make that stipulation?

Mr. Goldstein: I will stipulate that, subject to

the objection heretofore made as to competency and relevancy.

The Court: That is proper.

Mr. Patterson: At this time the Government rests its case, subject to the right to introduce such testimony as may be necessary to rebut any testimony introduced by the Claimant regarding the seizure, since that question has been raised by the pleadings.

Mr. Goldstein: I now move for dismissal on the ground that the record, as it now stands, clearly indicates that this article or machine was taken from the private home of the claimant in Portland, Oregon, long after the interstate character of the article had ceased and after it became his personal property, the personal property of the Claimant; and the Court has no [15] jurisdiction over a proceeding of this kind, in the absence of any showing that it was transported in Interstate Commerce or being used through the channels of Interstate Commerce; that, as far as an instrument of commerce in interstate trade is concerned, it has long ceased——

The Court: How does the record show that?

Mr. Goldstein: The record shows that by the fact that the stipulation shows that this article was shipped on or about June 14, 1945, to Olsen in Portland, Oregon, and that the article was seized on July 28, 1945, more than a month later, in the home of the Claimant.

The Court: What else does it show?

Mr. Goldstein: That is about all it shows.

The Court: Did he do anything with it?

Mr. Goldstein: No, your Honor. The stipulation specifically states "It is understood and agreed that the Claimant, by the admissions and stipulations herein contained", that is the shipment of the article from New Jersey to Portland, Oregon, "Does not admit that the same are competent, material or relevant herein by reason of the following contentions of the Claimant, which are factually denied by the Government:

"(1) That the Court has no jurisdiction over the subject matter of this proceeding, in that, the device, at the time of its seizure from the home of the claimant, was not then being transported or was in the course of interstate commerce, [16] but that it had passed beyond the interstate commerce channels and was within the private home and in the exclusive possession of the claimant, with no intention of transporting, selling or otherwise disposing of the same, but was acquired, used and intended to be used for the personal use and benefit of the claimant and members of his family, and for no other person or persons, and as so used, in the home of said claimant, it was not labeled within the meaning of the Food, Drug and Cosmetic Act."

The Court: Put the Claimant on the stand and let him prove how he got it, what he is doing with it, and I will hear you again.

WILLIAM RAY OLSEN,

the Claimant herein, was thereupon produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Goldstein:

Q. Mr. Olsen, you are the same William Ray Olsen who is the Claimant to the machine that was seized by the Government? A. Yes.

Q. Where were you living on July 28, 1945?

A. Living at 7425 Southeast Insley Street, at the home of my parents.

Q. I assume that had been your home for some time before July 28, 1945? [17] A. Yes.

Q. Is that the private home of your parents and yourself? A. Yes.

Q. Which is to say, in the City of Portland, Multnomah County, Oregon? A. Right.

Q. Were you on that date in possession of a certain device or machine known as a "Spectro-Chrome"? A. Yes, I was.

Q. How long had you had possession of the machine prior to the time of its seizure?

A. Just approximately a month.

Q. Who, if anybody, was using it in the family?

A. My mother was the only one using it.

Q. Was it used by any other person or persons?

A. No, just my mother only.

Q. Who owned the machine? A. I do.

Q. Did you pay for it?

(Testimony of William Ray Olsen.)

A. Yes, I paid cash.

Q. How much cash did you pay? A. $90.

Q. You had the complete possession of that machine in your private home?

A. Yes, I did. [18]

Q. Was it ever taken outside the home?

A. No, never.

Q. Was it being used for the purposes of resale or reshipment? A. No.

Mr. Patterson: If your Honor please, I object to the intended use of the machine on the grounds it is immaterial and irrelevant, as to the intended use of the machine.

The Court: He may answer, subject to the objection.

Mr. Goldstein: Q. You have already answered that, I think? A. Yes.

Q. Did you answer that question?

The Court: No, he did not answer it.

Mr. Goldstein: Q. Was that machine so purchased and acquired by you and maintained in your private home?

The Court: No. He answered that question "No", I believe.

Mr. Goldstein: Q. Was it intended to be used for any other purpose?

A. No, it was not.

Mr. Patterson: If your Honor please, I move at this time to strike out the witness' answer as to the use that he intended of the machine, for the same reason stated in my previous objection, that

(Testimony of William Ray Olsen.)

it is irrelevant and immaterial as to the intended use.

The Court: The answer may stand, subject to the objection.

Mr. Goldstein: Q. Was it intended to be sold or shipped in commerce at all? [19]

Mr. Patterson: The same objection, your Honor.

The Court: The same ruling.

Mr. Goldstein: Q. Was this machine forcibly taken from you?

Mr. Patterson: The same objection.

A. Yes.

The Court: I think the seizure is an immaterial issue in this case, inasmuch as I have directed the machine to be retuned.

Mr. Goldstein: You may inquire.

Cross Examination

By Mr. Patterson:

Q. You are a member of the Spectro-Chrome Institute, are you not? A. Yes, I am.

Mr. Goldstein: That is all objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: We will see where it leads.

Mr. Patterson: Q. You are a member of the Institute? A. Yes, I am.

Q. What was the entrance fee that you paid to enter the Institute?

A. Well, I joined the Institute.

Q. How much did it cost you to join the Institute?

(Testimony of William Ray Olsen.)

Mr. Goldstein: So that I may not have to object to each question, this is all subject to my objection. May that be understood?

The Court: I understand. [20]

Mr. Goldstein: My objection is that it is incompetent, irrelevant, and not proper cross examination.

The Court: I understand.

Mr. Patterson: Q. How much did you pay to join the Institute?

A. Well, it cost $90 to join, and for the $90 you are given one Spectro-Chrome to become your personal property.

Q. You did not pay anything for the machine, did you?

A. I paid $90 for the machine and I got my membership with it.

Q. Isn't it a fact that you paid $90 to become a member of the Institute and that you got the machine with it?

A. I pay dues of $3 a year for my membership.

Q. That hasn't anything to do with this question. What I wanted to know is: Isn't it a fact that you paid $90 to join the Institute and that the machine was given to you?

A. Yes, I got that all with the $90, membership and machine both came, plus the literature, it all came for $90.

Q. The entrance fee was $90 to join?

A. Well, I wouldn't say it that way. Everything comes to you for $90. You don't pay $90 for

(Testimony of William Ray Olsen.)

the entrance fee and then get the machine as a gift. The machine, the accompanying literature and the membership is all for $90.

Q. Who is privileged to use the machine?

A. Just members—just myself and members of my family only. No one outside the family has ever used the machine, and it is against the rules and regulations, which I signed, to use it [21] outside our home.

Q. What do the rules say as to who can use it?

A. The rules say this, that only members of my immediate—members in the home where I reside can use the machine. Other people, like relatives, who reside elsewhere cannot use the machine, so that limits the use of this Spectro-Chrome to myself, my two brothers, my mother and my father and no one else.

Q. If there were other relatives living in the home, would they be included, or not.

A. They could not use the machine, no.

Q. Do you know what the rules say as to the relationships that can use the machine?

A. Well, there is a rule in there about blood relationship. That has something to do with it. But I myself am not going to allow anyone outside of my mother and father and my two brothers to use the machine. I have adhered to that rule and I am going to continue by it.

Q. Have you had an opportunity to examine Government's Exhibit No. 1?

A. No, I have not.

(Testimony of William Ray Olsen.)

Q. I wonder if you would step down, with the Court's permission, and look at that?

A. Yes.

Q. Is Government's Exhibit 1 substantially identical with the machine that was taken from your place? [22]

A. Yes, it is. It is identical, to the best of my ability.

Q. How was the machine received at your home?

A. The machine was received at my home, delivered by the Railway Express Agency. I answered the door and he left the machine on the porch. I signed my name to a receipt which the delivery agent required and he said "From now on, it is yours." I said "Well, I will take it from the front porch," and I took it into my home.

Q. Do you know where the machine came from?

A. Yes.

Q. Where did it come from?

A. It came from the Dinshah Spectro-Chrome Institute in Malaga, New Jersey.

Mr. Patterson: That is all.

Redirect Examination

By Mr. Goldstein:

Q. Was this machine, after it had arrived in your home and had been held by you and so forth, ever held by you for sale?

A. No; I never intended to sell it.

Mr. Patterson: Just a moment. The Government wishes to object as to any purpose or any

(Testimony of William Ray Olsen.)

intended uses that the Claimant might want to put the machine to after he had received it.

The Court: The record may show the Government has objected to that question. Let him answer. The answer may be permitted, subject to the Government's objection. [23]

Mr. Goldstein: Q. From the time you received the machine and during all the time thereafter, and up to the time of its seizure by the Government, was this machine ever held by you or intended to be held by you for sale? A. No.

Mr. Patterson: If your Honor please, the Government moves to strike that answer on the same ground.

The Court: The answer may stand, subject to the objection.

Mr. Goldstein: Q. One further question: Were you perfectly satisfied with the machine?

A. Yes.

Mr. Patterson: The same objection.

A. I am perfectly satisfied.

Mr. Goldstein: Q. Were you perfectly satisfied with the machine for the purposes for which you purchased it?

The Court: Wait a minute. Do you want to make an objection?

Mr. Patterson: What is the question?

(Question read.)

Mr. Patterson: The Government objects to that question on the ground that it goes to the merits of the case, which have already been stipulated, and

(Testimony of William Ray Olsen.)

also on the ground it is incompetent, irrelevant and immaterial whether the claimant was satisfied with the machine as he purchased it for his intended use.

The Court: You may answer, subject to the objection.

Mr. Goldstein: Q. You may answer. [24]

A. Yes, I am perfectly satisfied with the machine.

Mr. Patterson: The Government also moves to strike out the answer.

The Court: The answer may stand, subject to the motion and the objection.

Mr. Goldstein: That is all.

The Court: How old are you?

A. I am 23.

Q. Where were you born?

A. Born and raised at 7425 Southeast Insley Street, Portland, Oregon.

Q. And that is your present address?

A. Yes, it is.

Q. What education have you had?

A. Graduate of the Marysville School, then I went to Benson Tech. and graduated there.

Q. Benson Polytechnic in this city?

A. Yes.

Q. What year did you graduate there?

A. June, 1941.

Q. What did you study there?

A. I studied gasoline engines, cars, then I also took up science and chemistry and physics and

(Testimony of William Ray Olsen.)

things of that sort that are similar to Spectro-Chrome Metry.

Q. It was in 1941 that you graduated from there? [25] A. Yes.

Q. You were how old, then? You were 17 or 18?

A. 17 or 18. I don't remember exactly.

Q. What did you do after that?

A. I worked at the Columbia Aircraft Industries during the war.

Q. In this city? A. Yes.

Q. What did you do there?

A. Well, I was an aircraft mechanic.

Q. Just a little bit about what you did there?

A. We worked on the naval bombers and so forth. It was my job to make parts and finish them according to the specifications of the company. I was classified as an aircraft fabrication worker.

Q. About what did you make there?

A. Well, I did forming and shaping——

Q. What were your wages, about?

A. I started in at 60 cents an hour and I was raised to $1.25 just before the war ended.

Q. You were not in the Army or Navy?

A. No, I was not.

Q. You did not go on to college after finishing Benson Tech.? A. No, I didn't.

Q. Was that for financial reasons?

A. Yes. [26]

Q. You are not married? A. No.

Q. You have always lived with your mother and father at your present address?

(Testimony of William Ray Olsen.)

A. That is right.

Q. How old are your parents?

A. One of them is 53 and the other is, I think, about 55, approximately.

Q. Is your father in business?

A. No. He is an employee of the Inman-Poulsen Lumber Company.

Q. What does he do there?

A. He is a carrier driver.

Q. Driver?

A. Yes, drives a lumber carriage.

Q. Oh, yes. Do you know what schooling your parents have had?

A. They have had grade school, but I don't think they have ever had high school.

Q. When did they come to Portland?

A. Around in 19——I don't know. What was the time of the first World War? I don't remember.

Q. You have brothers and sisters?

A. I have two brothers.

Q. Do they live at home?

A. Yes, they both live at home.

Q. How old are they? [27]

A. One is 21, I believe, and the other is 24.

Q. Do they have high school educations?

A. Yes. My youngest brother graduated from Benson and the oldest one graduated from Commerce.

Q. Commerce is another high school?

A. Yes, that is right.

(Testimony of William Ray Olsen.)

Q. Have you used this instrument for any illness of your own? A. Yes, I have.

Q. What results did you get, in your opinion?

A. The first thing I did—I had warts on my hand and I used the Spectro-Chrome and it cleared them up in a remarkably short time. I had stomach disorders and that cleaned it up in a very remarkable short time.

Q. For what ailment did your mother use the machine?

Mr. Patterson: If your Honor please, I think the testimony of the witness would be incompetent as to any disability or ailment that his mother was suffering from.

The Court: He may answer, subject to the objection.

A. She was using it for nervous disorders. Before she used it, she was under the care of a medical doctor, and he confessed to me——

Mr. Patterson: If your Honor please——

A. ——and my mother that he couldn't do any good.

Mr. Patterson: I object to that as hearsay as to anything that the doctor said that she was suffering from. [28]

The Court: He may continue.

A. The doctor couldn't do anything for her. He said there was nothing he could do, so I paid him up and we purchased the Spectro-Chrome and I began to give her these Spectro-Chrome treatments

(Testimony of William Ray Olsen.)

according to instructions and she began to get better.

Mr. Patterson: I object to that as calling for a conclusion of the witness, being a conclusion of the witness.

The Court: He may continue.

Mr. Patterson: He is not competent to testify as to whether or not she was getting better or not.

The Court: He may continue, subject to the objection.

A. She began to get better and to improve. Then, the Government came into our home and seized the machine against my will.

The Court: You don't need to go into that.

A. She was denied the use of the machine.

The Court: You don't need to go into that. Is she still using it?

A. Yes, she is, now that it has been returned she is using it.

The Court: You may cross examine, if you wish.

Recross Examination

By Mr. Patterson:

Q. Do you have any physical disabilities?

A. Yes, I have one.

Q. State that, please. [29]

A. My right leg is stiff.

Q. What was that the result of?

A. That was the result of an accident at the age of four.

Q. What kind of an accident?

(Testimony of William Ray Olsen.)

A. I fell down on the sidewalk and had a severe bump, and the medical doctors have never been able to give it a diagnosis, so I don't know what is wrong.

Mr. Patterson: As to what the medical doctors say, I object to that as not responsive to my question and I move that it be stricken.

The Court: It may stand, subject to the objection.

Mr. Patterson: Q. Is your leg still stiff?

A. Yes, it is.

Q. Have you used the Spectro-Chrome on it?

A. No, I have not.

Mr. Patterson: That is all.

Mr. Goldstein: That is all.

(Witness excused.)

Mr. Goldstein: The Claimant rests.

The Court: Any rebuttal?

Mr. Patterson: No rebuttal, your Honor.

The Court: The case is submitted. I will render a decision on it today or tomorrow. Court is now in recess.

(Thereupon the proceedings had in the above-entitled cause on, to-wit, May 21, 1946, were concluded.) [30]

[Title of District Court and Cause.]

CERTIFICATE

I, Ira G. Holcomb, hereby certify that on Tuesday, May 21, 1946, I reported in shorthand certain testimony and proceedings had on the trial of the above-entitled cause, that I subsequently caused my shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 30 pages, numbered 1 to 30, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 14th day of June, A.D. 1946.

/s/ IRA G. HOLCOMB,
Court Reporter. [31]

Title of District Court and Cause.]

TRANSCRIPT OF HEARINGS ON FINDINGS OF FACT AND CONCLUSIONS OF LAW

Portland, Oregon, Tuesday, June 25, 1946

10:27 o'clock a.m.

The Court: It is your own motion. You want to be heard [1*] on the findings.

Mr. Patterson: These are my findings, your Honor. So far as I am concerned, they seem to be in conformity with your Honor's opinion. If counsel for the defendant has some additional ones he wants in, I don't know about them.

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* Page numbering appearing at top of page of original certified Transcript of Record.

The Court: You sent word you wanted to be heard about Finding No. 4.

Mr. Patterson: Yes, I wanted findings entered. I haven't been served with any and I proposed some. If the Court feels these are sufficient or proper I am perfectly satisfied with these. If he has some others in mind I would like to see those before they are entered.

Mr. Goldstein: If the Court please, I submitted, immediately upon the receipt of the opinion, written opinion of the Court, which has been filed as part of the record, a judgment, in which I referred to the opinion in this language: "and after due deliberation thereon the Court files its findings and decision in writing and orders that judgment be entered herein in accordance therewith in favor of Claimant."

And consequently I proceeded as follows: "It is hereby decreed that the petition for condemnation be denied and that the article be returned to the Claimant, and that the Claimant have judgment dismissing the libel."

I was under the assumption all of this time the judgment had been signed and the matter closed. Only a few [2] days ago I was informed that the judgment had not yet been signed and that Mr. Patterson was insistent on having special findings.

The Court: I am listening.

Mr. Goldstein: I was not aware that it was compulsory to have findings, and if there are findings I would like to have the privilege of preparing them and to have the Government interpose any objec-

tion thereto he might see fit, and only just a few moments ago have I for the first time seen the proposed findings submitted by the Government. I do not like the wording of the Government in respect to the findings, as gathered from your Honor's opinion, and I would like to formulate and frame the wording that I think would be more suitable to that, in view of the situation, but I do think, however, it might be to the interest of both of us if there may be some clarification by the Court as to exactly what specific findings the Court desires to make, and if my judgment order is adequate and sufficient, that there be no necessity for making specific findings. But if the Court wants specific findings presented I think the Court might assist me somewhat in informing me just what particular findings the Court desires me to submit. Otherwise I would submit my own views of the situation and then counsel could, with propriety, object to them and submit his own. But, as I stated, I do object to the findings as submitted by the Government at this time. [3] I have only had two minutes to read them over, but I have seen enough of them to be of the opinion that the language used is not the type of language that I think the Court ought to sign because it is not an exact finding, as I view it. But if the Court wants to take the time at this time to discuss the situation I am perfectly prepared to discuss it.

May I inquire, if the Court please, is there a specific rule? I admit some ignorance about the

situation that compels or requires findings to be submitted.

The Court: Yes, in all non-jury cases that are subject to the rule. I don't know whether this case is subject to the rule or not.

Mr. Patterson: I looked into it somewhat, your Honor. From my search I came to the conclusion the Court is not required to. It is within his discretion whether or not to sign findings.

The Court: There is so much stress placed on findings these days that I just assumed, as a matter of course, that findings would be in order. Let's see if there is any great difference between us. You have a copy of your designations before you?

Mr. Goldstein: Just handed to me a moment ago.

The Court: You keep repeating that, like you attach some importance to it.

Mr. Goldstein: Yes, I do, because I do like to reflect a [4] little on findings.

The Court: Who is rushing you?

Mr. Goldstein: I am not criticizing. The only thing is, I think usually the prevailing party is the one that submits the findings, and this is a novel experience to me, to have findings presented by the losing party.

The Court: Don't you notice you learn something every day from the younger men in the profession? Keep on your toes. They have me standing on my head half of the time. Also, some of the older ones. Here Mr. Patterson has No. 1, "That this Court has jurisdiction of the article of device

labeled in part 'Spectro-Chrome' and accompanying labeling and that it is within the jurisdiction of this Court."

Mr. Goldstein: We object to that because that is one of our serious contentions. I think the Court has no jurisdiction over the subject matter, and there he submits a finding that is contrary to all of our contentions and I think the Court in its opinion came to that conclusion.

The Court: Then the decree would be dismissal for want of jurisdiction?

Mr. Goldstein: Yes. But there is no necessity for making any finding as to that at all.

The Court: And you might explain your position a little further about that.

Mr. Goldstein: Well, it is our contention that the Court [5] has no jurisdiction over the subject matter because it had passed the interstate commerce stage. It was in his private home. It was his own property and the Government had no more right to come in and take jurisdiction over something that I think Congress never contemplated that it should have, although it is true that the decree might find that the Court had general jurisdiction in addition to the other findings of fact. Had your Honor been of the opinion that an easy way of disposing of the case would be to hold that it had no jurisdiction whatsoever, it would have warranted the question of the Government's power of condemnation under the circumstances in this case and the Constitutional questions as to transportation, and, therefore, I would prefer to have the Court

make findings on those questions which I regard as true issues in the case.

I think the conclusion to be drawn from the language suggested by me is that the Court has no jurisdiction over the subject matter because of the view that I take as to the finding that the interstate transportation had ceased when it came into the hands of the purchaser, and also as to the finding challenging the right to invade one's private home against his will and removing his property without due process of law.

But in the final analysis, as I view it, the Court had no jurisdiction over this particular matter, so when your Honor finds that it did I am fearful that it might run counter [6] to your Honor's opinion and ultimate conclusion.

If I may be permitted to make this suggestion, if the Court wants findings I would be glad to submit the findings as I view them in accordance with and in the light of the Court's viewpoint all through the proceedings, and serve them upon counsel and bring them here next Monday.

The Court: I won't be here next Monday.

Mr. Goldstein: Well, two weeks from next Monday.

The Court: I won't be here two weeks from next Monday. I am not sure what I want. I am very interested in what you are saying, very much interested. Jurisdiction is a tricky field to me.

Mr. Goldstein: And not only that, I would hesitate to have the Court bind its hands here and have the Appellate Court say the Court finds certain

things, placing its approval of doing something that we had no right to.

The Court: Well now, what is there?

Mr. Goldstein: No. 2 is all right. There is no objection to that, of course, because that is perfectly agreeable, "That this action is brought by way of libel of information."

No. 3 is all right because it is in line with our stipulation.

No. 4 is all right because it is in line with our stipulation.

But before we proceed with No. 5 I think we ought [7] to have a finding in accordance with the facts in the case, that the initial process was issued; not only that affidavit of one who had knowledge of the facts, but it was upon the affidavit of Mr. Patterson, who had no knowledge of the situation, and that the order would not justify, as I view it, the invasion of the home against his will, and also that the entry was illegal.

I would like to have language in there that would protect us in our contention which might be considered by the appellate court as to the circumstances under which the Government, with the writ of attachment—that is what it amounts to—may come and, against the will of a party, the possessor of the article, take personal property away from him by invading his home. He can't do that. In the civil courts here a writ of attachment is issued for personal property. The Sheriff can only seize it when it can be done without the invasion of Constitutional rights and safeguards. And he certainly

would not dare to go into your home and seize your piano under attachment. You could under execution, but this is merely an attachment. And I contend this order was not issued on the affidavit of a party who has any personal knowledge of the facts. Certainly you would not have a right to go into a private home and seize it against his will and without his consent and make an illegal entry in order to do that. I think that ought to be set forth in language [8] plain and clear enough so the appellate court might be in a position to pass on the important question that involves the rights of our citizens all throughout the United States.

It is a very important issue and I think it should be set up in proper language, so that the Court can pass on it.

And then No. 6, I have no objection to that, because, although to me that is argumentative because it could be all put in one finding setting out the subject matter of your opinion, that it was not inherently dangerous and that it was received after the interstate commerce had stopped; that it was bought by him for his personal use and for members of his family; that he did not intend to sell it or use it for commercial purposes, and did not intend to use it in interstate commerce. And I think a finding should be clear and specific upon that ground so the appellate court can readily recognize the issues that they had to pass upon. In other words, we would like to choose the language.

Mr. Patterson: If your Honor please, claimant's counsel refers to the issuance of process. I don't have any objection to putting in the findings

how the process was issued, but when the claimant's counsel refers to the facts that led up to the seizure I believe the Court directed at the time of the trial that no testimony would be taken on that issue, so I don't want anything in the findings about that because the Court [9] directed no testimony be taken on that issue.

Now when counsel refers to the rights of citizens being invaded, I want to show and have in the findings just exactly which rights were invaded and which Constitutional provisions were taken advantage of or were not, such as I have put in Paragraph 5 of the findings, that they were contrary to the Fourth Amendment. We have talked about this in pre-trial conference and on motion before the trial, about the citizens being invaded in the private home, and I want to know what rights they were, whether Fourth or Fifth Amendment or what it was, because we can talk about private citizen's rights being invaded but unless we get right down to the point, which rights were invaded and which rights were guaranteed to the citizen, the appellate court will not know any more about it than I think we have known ever since this trial started about which rights were invaded. Which rights were they? Were they the rights of the Fourth or Fifth Amendment, or what were they? From your Honor's opinion I gathered the rights you referred to being invaded, going into the home, were those guaranteed by the Fourth Amendment. If there were others I have no objection to putting those in, but I do want to know just exactly what the de-

fendant refers to when he says his rights were invaded when they went into his private home and took this machine.

The Court: Mr. Goldstein, you made a remark about execution. Is there a statute in Oregon permitting the execution [10] to be levied in a dwelling against the consent of the owner? There are in some states, I notice.

Mr. Patterson: One other thing: Your Honor, counsel mentions about the lack of jurisdiction by the Court. If the Court feels that is part of the findings I would have no objection to that being part of them and going up on that question, that the Court has no jurisdiction for the reason that the article passed out of interstate commerce and the interstate commerce phase of the device had ended. I would have no objection to that going in, if that is the Court's finding, and the Court to base the judgment on that fact, or partly on that fact.

The Court: You had an idea that you advanced at the trial, Mr. Patterson—I am not sure that you carried it forward in these findings that you submitted—that the seizure had to be unbroken throughout the trial to maintain the jurisdiction of the Court.

Mr. Patterson: Yes, your Honor. That is one of the reasons that I have Paragraph 1 in the findings. Your Honor stated at the time you returned the machine that it was not passing out of the jurisdiction of the Court and the Government would have its rights of appeal and the Court would protect it. I think one of the necessities on appeal is

the jurisdiction of the res, and when the judgment is ordered I have also prepared a motion moving the Court for an order setting that portion of [11] the judgment aside which refers to the return of the article to the plaintiff pending the appeal.

The Court: You have that clause in your form of judgment, Mr. Goldstein, but your client has the article now. It does not need to be returned.

Mr. Goldstein: I didn't quite follow your Honor.

The Court: I say, you have a clause in your form of judgment that the article be returned and restored to the claimant, but he has it now.

Mr. Goldstein: The reason I did that was because I had previously presented an order after your Honor had directed its return, which order had not been signed, so I wanted some formal record directing its return. If the Court feels that is not necessary in there, I have no objection to it being removed, but there wasn't any order signed and I had prepared one.

Mr. Patterson: I think that it is necessary, your Honor, for the reason that your Honor implied in the transcript there. The Court said that the article was not passing out of the jurisdiction of the Court.

The Court: Well, I meant by that it was in the State of Oregon.

Mr. Patterson: Well, I think it would still have to be under the jurisdiction of the Court in order that it could be proceeded against. [12]

The Court: Well, how?

Mr. Patterson: If the Court absolutely uncon-

ditionally releases the res as being proceeded against, I think I am compelled to say that the Court lacks jurisdiction to go any further.

The Court: Well, that is what I though was your decision.

Mr. Patterson: So that in order to protect our rights of appeal I may say that I wanted in the judgment that the article be returned, so it will show the Court still had jurisdiction at the time we had the trial. If the Court felt that the Court didn't have jurisdiction if the article was returned, I think the Court should have informed us and under Mr. Goldstein's motion at the time of the trial we would not have needed to have any trial; the case would have been dismissed cold.

The Court: You have just talked yourself around the barn. I have never said anything that indicated that I thought the Court had lost jurisdiction.

Mr. Goldstein: I have never made such a claim.

The Court: You indicated in the brief purposes of argument had occurred but did not credit that to me. That was your idea. I will tell you now what my idea about that is, after having had that opportunity for reflection. It is the same as my ideas confirming the impression I had about it, that the situation is comparable to the ordinary situation [13] in admiralty where it was not deemed necessary that continuity of seizure be maintained. The common practice in admiralty is to permit possession to be resumed by the libelee to the giving of bond, or even on his own recognizance, and it has

never been thought that that defeated the possession of the admiralty court in forfeiture proceedings, and I admit the cases talking about seizure, giving jurisdiction to forfeiture proceedings, but I just don't think that means continuity of seizure must be maintained unbroken. It is a field that I hesitate to venture into. There is no field more difficult to me than the jurisdiction field. It is one that is easy to talk on but with lots of falls in it.

We have been talking here this morning about two separate jurisdictional questions. The one we are talking about right now, and that you are interested in, Mr. Patterson, has to do with continuity of the seizure. The one Mr. Goldstein is talking about grows out of the ending, as he views it, of the movement in interstate commerce. Those are different questions, and I want to make sure that they are kept definitely in my mind.

I agree with your logic, Mr. Patterson, if when I sent the thing back to the man to use that ended the case, why, I agree with you that we should not have done any more, and there never would have been any trial on the merits then. But I don't think it had that effect any more than releasing [14] a ship on a bond, or releasing anything else in a libel in admiralty. So I just think it will make unnecessary trouble for whoever touches the case later to talk about restoring possession to a man, or returning it to him, if it was done in an early stage of the case. So far as Oregon is concerned, our minute made at the time of serving the order—we don't have the minute proceeding, or we don't em-

ploy it nearly as completely as they do in other District Courts, the reason being largely I think our necessities are not so great for them. In a city like Los Angeles the courts could not run if they had to wait for lawyers to bring in a formal written order—too many lawyers, too many cases, too many judges; and I think it is safe in saying nine out of ten things they do in the courts there the only record that is made of them is what the clerk makes, and it occurred to me that in this case that would be sufficient. This is the kind of case we read about difference of opinion, there are so many questions in it. Every time a man opens his mouth and turns around he raises a question. I wanted to keep as few questions in it as I could.

I don't know right now, Mr. Goldstein, whether the form of the judgment, just thinking of your proposition about the interstate commerce question in the case, should be a dismissal for want of jurisdiction. Just the other day the Supreme Court had this before it. Judge Jenney, whom Judge Fee [15] and I knew very well and who I thought was a very able man—he is dead now—in Los Angeles, had a complaint before him about some members of a religious sect down there that got into difficulties with the Federal Government and they were being prosecuted criminally, so I suppose as a counter measure—I don't know about that for sure—they filed a civil action in the Federal Court in Los Angeles against the F.B.I. agents who had raided the premises and they grounded it on one of the Federal Constitutional amendments. They

claimed the Court had jurisdiction because of the question. They claimed they were making arrest under the Constitution of the United States.

Judge Jenney dismissed the complaint and said, "This is no different than any other claim of damages for trespass. If these officers went beyond their legitimate spheres on the premises of the defendants they are liable for trespass the same as anybody else," and relegated them to the State Court for their action. He said, "They have no claim arising under the Constitution of the United States and, therefore, this Court has no jurisdiction," and he dismissed it for want of jurisdiction. The Ninth Circuit affirmed it. In a divided opinion the other day—Justice Black wrote the majority opinion; Chief Justice Stone was still alive and he wrote the dissenting, one or more, and the majority reversed that holding and said—now listen to this—said, "The Court [16] should have retained jurisdiction and tried the case to find out if it had jurisdiction. Only by going into the merits could it find out whether it had jurisdiction."

Now these plaintiffs might or might not have had a claim arising under the amendments depending on what the fact issues are.

Well, I have difficulty with a question like that. That is hard for me to say, that you should try a case on the merits to find out if you had jurisdiction, it following, of course, that if at the end you find you haven't jurisdiction you dismiss it for want of jurisdiction. That would seem to follow. But if you dismiss it on the merits that would be

adjudication. If you dismiss it for want of jurisdiction and you go over in the State Court where the statute had not run you could bring it over there and be heard on it. So here we tried the case and, what I would consider, tried it on the merits and you have brought me up here in form a dismissal of that. You say "with prejudice" here at the end, your closing words, but you tell me now that the facts which were disclosed at the trial, namely, that the interstate journey of this article was completely ended, was in the hands of the private owner, the ultimate consumer, and those facts at the trial on the merits show that the Court didn't have jurisdiction of the subject matter; that it wasn't the kind of a thing that could be seized. That sounds kind of like the Los Angeles [17] case.

Mr. Goldstein: Well, if I may be permitted, your Honor, I think to a large extent your Honor is correct but the situation factually is a little different.

The Court: I am neither correct nor incorrect. I am confused.

Mr. Goldstein: Well, I don't think there is any occasion for confusion, in my opinion, because—I may be wrong about it, but to me it is rather simple, for this reason: Because when we talk about the lack of jurisdiction I don't mean by that the Government had no right to bring this type of an action. In that case you commented upon the question arose whether or not they would have the right to bring that action and the Supreme Court apparently held they could not. They could not deter-

mine that until they went into the merits to find out; then the merits would show whether they had a right to initiate that action.

In this case we all concede the Government had a right to bring this libel proceeding, but I contend if the facts are presented they disclose upon the merits they did not come within the provisions of the law upon which this complaint is founded. In other words, in order to maintain their cause of action against the defendant they have got to show this article was mislabeled, which they have proved, but they have also got to prove that it was engaged in interstate [18] commerce. They established the first premise and failed on the second premise. Failing in that second premise, then upon the merits they were unable to establish the case upon the merits because the facts disclosed that they had no jurisdiction to proceed. They could not prove that second jurisdictional point. They were able to establish the first jurisdictional point to come into the Federal Court, and they failed on the second one, and in that, just like you bring an action in the Circuit Court—you bring an action for a guest, you have got to prove gross negligence. You prove ordinary negligence but you are bringing it upon the gross negligence and the Court dismisses it because the Court finds it has no jurisdiction to submit it to the jury upon the merits because there was no evidence establishing that within the framework of that statute, and that is what I mean by that.

I hope I make myself clear.

The Court: Well, I must say to you that is a misuse of the term "jurisdiction."

Mr. Goldstein: Maybe I misused the term.

The Court: The one you are making now. You make it easier, I think——

Mr. Goldstein: I don't know that I misused the term, but the only thing is, if you say the Court has jurisdiction of the article of device, that would be upon the premise, as I [19] view it, that the Government was able to establish that the article was within the confines of interstate commerce and that the interstate commerce had not ceased, and I don't want to be placed in the position where the Circuit Court of Appeals or the Supreme Court could say, "Why, we have got to reverse the case because it is admitted the Court has jurisdiction over the article and, therefore, having jurisdiction over the article, and they admit the article was mislabeled, that is an end to the case." I don't want to place myself in that jeopardy.

The Court: We start all findings in this practice in non-jury cases stating we had jurisdiction and you waived it.

Mr. Goldstein: Well, over the cause of the suit that would be all right—over the libel proceeding. If the Court feels that is necessary it might be stated that this action is brought by way of libel of information against the device labeled "Spectro-Chrome" and accompanying labeling, which action is subject to jurisdiction of the Federal Court. In other words, make it clear you are not making a specific finding about something in the end you find the Government failed to establish its jurisdictional question. I am using the word "jurisdictional"

again, because to me that is important. They would have no right to come into this court at all unless they would establish those two premises and they can't establish them. [20]

Mr. Patterson: Mr. Goldstein refers to a lack of jurisdiction for the reason or reasons based on interstate shipment. I have no objection to the case being decided on that, if it is his desire—no objection at all. However, the statute provides the article may be proceeded against while in interstate commerce or at any time thereafter. Should the Court find Congress exceeded its power I have no objection to decision on that ground.

One other situation, though, I would like to discuss, and I would like the Court to state a position on his theory when he referred to the article of device labeled "Spectro-Chrome," and if the Court had in mind at the time he directed the return of the article it would be a return similar to a return on bond or return on personal cognizance I don't have any objection to that, either. That is all right. I concur in the Court's opinion, that the Court still had jurisdiction, if that is the type of return made. I just wanted to be sure it wasn't an unconditional return. If the Court directed it be returned on bond or on cognizance I also believe the Court had jurisdiction and I would have no objection to that. I would like the Court to state in the record that is the type of return he had in mind when he directed return to the claimant.

Mr. Goldstein: If the Court please, I may be making myself a lot of trouble. The testimony is

complete. The testimony [21] is taken, with the stipulation and evidence that is part of the record. The Court has filed its written opinion, which is in the nature of a finding. I don't think we need any more—just merely a judgment dismissing the libel, and any specific findings I think would be surplus, because we went into the whole subject pretty thoroughly, but of course I will submit them.

Mr. Patterson: Let me say this, your Honor. There is an indication there is necessity of findings here because of the total lack of agreement on our part to prepare findings in accordance with the Court's opinion. Mr. Goldstein, when the opinion was rendered, said he would not prepare findings. He didn't believe he could prepare findings. And I have prepared some that we are not in agreement on, and I did state that in all probability this case would be appealed, and I think in order to get the precise points the case was decided on at issue, so we will know what we are talking about in the appellate court, I think it is necessary we do reach some agreement on the findings that should be entered.

The Court: Well, my only interest in findings is to discharge whatever my further duty is in the case. Our Circuit often comments that findings ought to be made necessary. I think that is what I will inquire about first, as to whether findings are required or usual in this type of case—required or usual; and it may be that I will ask you to give me your [22] ideas as to findings, or I may not.

I am glad we had this talk. This falls in on the

record. I don't think whoever looks at the case will need be in any doubt about what the issues were here and what was decided.

Mr. Patterson: May I say one thing more in relation to the provision in the judgment which refers to the diversion of the article? Isn't it a fact if the article is returned on the claimant's personal cognizance that it is usual in the judgment to exonerate his cognizance and direct that the machine be returned? I think there should be some provision in that that would refer to the fact and show that the Court intended that it be returned——

Mr. Goldstein: Similar to on a bond?

Mr. Patterson: ——to show that these provisions are required, have been complied with and that the article is now returned to the claimant?

Mr. Goldstein: I never challenged the fact that the machine is in the home, or not in the Marshal's office: no claim that it is.

The Court: I know you didn't. They are through.

Mr. Patterson: There might be a claim.

Mr. Goldstein: There surely will not be, so far as I am concerned, if I have anything to do with it, but if it makes him feel any better it could be said "Pending the trial of [23] the case the machine was ordered returned to his home." I don't know whether it is necessary but I would have no objection to that, to make him feel easier.

The Court: All right, gentlemen.

(Thereupon, Court was adjourned.) [24]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the oral proceedings had in the argument before the Court, the Honorable Claude McColloch, Judge, presiding, on Tuesday, June 25, 1946; that I subsequently prepared a transcript of said argument from my shorthand notes, and the foregoing transcript, pages numbered 1 to 24, both inclusive, contains a full, true and correct record of all of the argument and discussion had before the Court on said date, so reported by me in shorthand, as aforesaid.

Dated at Portland, Oregon, this 23rd day of August, A.D. 1946.

/s/ ALVA W. PERSON,
Official Court Reporter. [24]

[Endorsed]: No. 11403. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. William Ray Olsen, Claimant of One Article of device labeled in part "Spectro-Chrome", Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed October 24, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11403

UNITED STATES OF AMERICA,
Libelant-Appellant,

vs.

One article of device labeled in part "SPECTRO-CHROME" and accompanying labeling;
WILLIAM R. OLSEN,
Claimant-Appellee.

STATEMENT OF POINTS ON APPEAL

The Libelant-Appellant respectfully submits the following Statement of Points, upon which Libelant-Appellant intends to rely on appeal:

I.

The District Court erred in holding that the Libelant-Appellant was not entitled to an Order or Writ of the Court directing the seizure of the device and accompanying labeling from the Claimant-Appellee's dwelling.

II.

The District Court erred in finding that the Claimant-Appellee did not consent to the entry into his home for any purposes connected with this case.

III.

The District Court erred in holding that the machine and accompanying labeling had passed

beyond Interstate Commerce channels, and that, therefore, no interstate transportation was or had been, at any time, involved in this case.

IV.

The District Court erred in holding that the Claimant-Appellee was entitled to Judgment dismissing the Libel and adjudging and confirming the return of the article of device and accompanying labeling.

V.

The District Court erred in not entering a Decree of Condemnation against the article of device and accompanying labeling and ordering the device and accompanying labeling disposed of pursuant to 21 U.S.C. 334.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Statement of Points on Appeal on the Claimant-Appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the 30th day of October, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at

Law, Failing Building, Portland, Oregon, Attorney for Claimant-Appellee.

J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed Oct. 31, 1946.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Libelant-Appellant respectfully designates for printing the whole and entire record as particularly itemized in Appellant's Designation of Record to the District Court to be forwarded to the United States Circuit Court of Appeals, Ninth Circuit, it being the Appellant's intention to designate the whole and entire record on appeal, namely:

1. Libel of Information.
2. Order of July 26, 1945, allowing Libel to be filed.
3. Order of July 26, 1945, directing that process issue and directing publication.
4. Warrant of seizure and monition.
5. Marshal's return of service of the writ.
6. Affidavit of publication.
7. Appearance and answer of Claimant.
8. Motion to make scientific examination of slides.

9. Motion for Order directing Claimant to file stipulation for costs.

10. Order of March 11, 1946, reserving decision on Libelant's Motion.

11. Memorandum Opinion of Judge McColloch dated April 4, 1946.

12. Order of April 4, 1946, denying Libelant's Motion to detach glass slides.

13. Order setting case for trial.

14. Claimant's Motion to Quash warrant, restore seized article to Claimant, and to dismiss Libel.

15. Affidavit of William R. Olsen, Claimant.

16. Libelant's Motion for Summary Judgment.

17. Order dated April 29, 1946, directing seized articles to be restored to Claimant.

18. Affidavit of William Rickard, Deputy Marshal, and Affidavit of David J. Holliday.

19. Petition for Order directing Claimant to produce the seized device and accompanying labeling.

20. Application for Pre-Trial Conference.

21. Stipulation between Libelant and Claimant.

22. Order denying Motions dated May 21, 1946.

23. Judge McColloch's Opinion dated May 22, 1946.

24. Libelant's Objections to proposed Findings of Fact and Conclusions of Law.

25. Suggested changes in the Findings of Fact and Conclusions of Law.

26. Findings of Fact and Conclusions of Law.

27. Judgment.

28. Notice of Appeal.

29. Order of Circuit Court of Appeals for the Ninth Circuit dated August 9, 1946, staying return of device to Claimant.

30. Order extending time to docket the appeal and file transcript on appeal.

31. Order directing Clerk to forward exhibits.

32. Transcript of Pre-Trial proceedings.

33. Transcript of trial proceedings.

34. Transcript of hearings on Findings of Fact and Conclusions of Law.

35. Designation of Record (D.C.).

36. Designation of Record to be Printed (C.C.A.).

Dated at Portland, Oregon, this 11th day of October, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Designation of Record on the Claimant-Appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the 11th day of October, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for Claimant-Appellee.

/s/ J. ROBERT PATTERSON,
Assistant United States Attorney.

[Endorsed]: Filed Oct. 15, 1946.

At a Stated Term, to wit: The October Term 1945, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the ninth day of August, in the year of our Lord one thousand nine hundred and forty-six.

Present:

Honorable Francis A. Garrecht,
Senior Circuit Judge, Presiding;

Honorable William Healy, Circuit Judge;

Honorable William E. Orr, Circuit Judge.

[Title of Cause.]

ORDER STAYING PORTION OF JUDGMENT OF DISTRICT COURT PENDING APPEAL

Upon consideration of the petition of the United States of America, for an order staying a portion of the judgment entered in this cause by the District Court of the United States for the District of Oregon on August 1, 1946, pending determination of the appeal herein heretofore taken by the appellant, and good cause therefor appearing,

It Is Ordered that the portion of the said judgment of the said District Court in the following words:

> 'It is hereby further ordered and adjudged that return of the said article of device labeled

in part 'Spectro-Chrome' and accompanying labeling to the Claimant herein, William R. Olsen, is adjudged and confirmed.''

be, and hereby is stayed pending the disposition of the appeal herein.

No. 11403

In the United States Circuit Court of Appeals

for the Ninth Circuit

THE UNITED STATES OF AMERICA,
Libellant-Appellant,

v.

WILLIAM R. OLSEN,
Claimant-Appellee,

and

ONE ARTICLE OF DEVICE LABELED IN PART "SPECTRO-CHROME" AND ACCOMPANYING LABELING,
Respondent.

Brief for Appellant

Appeal from the District Court of the United States for the District of Oregon

THERON L. CAUDLE,
Assistant Attorney General.
HENRY L. HESS,
United States Attorney,
District of Oregon.
J. ROBERT PATTERSON,
Assistant United States Attorney.

Of Counsel:
VINCENT A. KLEINFELD,
Attorney, Department of Justice.
JOHN T. GRIGSBY,
Attorney, Department of Justice.

GLASS-KEYSTONE PRESS

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No. 11403

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
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ONE ARTICLE OF DEVICE LABELED IN PART "SPECTRO-CHROME" AND ACCOMPANYING LABELING,
Respondent.

APPELLANT'S BRIEF

Statement of Pleadings and Facts

A libel of information was filed by the United States in the District Court of the United States for the District of Oregon, pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334), for the seizure and condemnation of a device designated as "Spectro-Chrome" which had been transported in interstate commerce from Newfield, New Jersey, to Portland, Oregon. The de-

vice was alleged to be misbranded within the meaning of 21 U.S.C. 352(a). (R. p. 4). A monition or warrant of seizure was issued pursuant to the libel, and the United States Marshal took possession of the device at the home of one William R. Olsen, in Portland, Oregon.

Olsen appeared in the action as claimant and filed an answer (R. pp. 16, 17) and motion to dismiss. (R. pp. 26, 27). He contended that the device had been unlawfully and forcibly seized at his home, while it was being used by him for his own personal use, in violation of his Constitutional rights. He also contended that the device was not subject to the jurisdiction or process of the District Court in that such device was not in interstate commerce at the time of the seizure. After certain proceedings had been had in connection with the motion to dismiss, the Government and claimant entered into a stipulation. The stipulation admitted that the device was misbranded when introduced into and while in interstate commerce, and reserved the jurisdictional question, the question as to the invasion of the claimant's Constitutional rights, and the right in both parties to present testimony in connection with such questions. (R. pp. 40, 86). The case was tried to the Court without a jury, and a written opinion was rendered sustaining the claimant's contentions. (R. p. 45). Findings of fact and conclusions of law were made, and a judgment was entered. (R. p. 53). The judgment provides for the dismissal of the proceed-

ing and for the return of the device to the claimant. This Court granted the petition of the Government for a stay of that part of the judgment which directs the return of the device to the claimant. (R. pp. 61, 141).

This Court has jurisdiction, under 28 U.S.C. 225, to review the judgment of the District Court.

STATUES INVOLVED

(References are to 21 U.S.C.)

§ 321. Definitions: generally

For the purposes of this chapter—

(b) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, * * *.

* * *

(h) The term "device" (except when used in paragraph (n) of this section and in sections 331(i), 343(f), 352(c), and 362(c)) means instruments, appartus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

* * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any

article or any of the containers or wrappers, or (2) accompanying such article.

* * *

§ 334. Seizure—Grounds and Jurisdiction

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issues of fact joined in any such case shall be tried by jury. * * *

§ 352. Misbranded Drugs and devices

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * *

STATEMENT OF THE CASE

The "Spectro-Chrome" consists essentially of a cabinet with an electric light bulb, an electric fan, a container for

water, glass condenser lenses, and glass slides of different colors. The cabinet has an opening in front through which light from the bulb may shine through the glass slides. (R. pp. 2, 3). Treatments (Tonations) are given by shining the colored light on various areas of the human body, the particular color or colors prescribed depending upon the nature of the ailment.[1]

Claimant's motion to quash was brought on for hearing on April 29, 1946. The transcript of the proceedings appears in the printed record commencing at page 74. The Court directed the Marshal to return the device to the home of the claimant. (R. p. 81). This direction was complied with. No decision, however, was rendered on the motion. Thereafter, it was agreed by the stipulation referred to that the particular Spectro-Chrome device involved here, together with accompanying labeling consisting of an assortment of written, printed and graphic booklets, circulars and other matter, had been shipped from New Jersey about June 19, 1945, to claimant at Portland, Oregon, and had

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(1) A condemnation suit under 21 U.S.C. 334, involving a similar Spectro-Chrome device and the same charges of misbranding (R. pp. 19, 83, 92), was tried on its merits to a jury in the United States District Court at Brooklyn, New York. The Government obtained a favorable verdict, and a decree of condemnation was entered, after a trial which lasted over six weeks.

been received by him about June 25, 1945. It is also agreed that the Spectro-Chrome is a device within the meaning of 21 U.S.C. 321(h), and that its labeling contained a number of false and misleading claims for the device in effecting the structure and functions of the human body, and regarding its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of the diseases, conditions, symptoms and disorders of man. (R. pp. 42, 87). In short, it was agreed that the Spectro-Chrome was such a device which, because it was misbranded when introduced into or while in interstate commerce, was subject to seizure and condemnation as provided for in 21 U.S.C. 334 except for the defenses raised in claimant's motion to dismiss and answer.

At the trial, two Spectro-Chrome devices, shown to be substantially the same as the device involved in this proceeding, were offered by appellant and received in evidence as Government's Exhibits 1 and 2. (R. pp. 93, 105). Copies of the pamphlets, booklets, and other literature which had been seized, and which constituted the labeling of the device, were offered by appellant and were received in evidence as Government's Exhibits 3 to 17, both inclusive. (R. pp. 96, 97).

The "Home Guide", Government's Exhibit 3, represents the device as effective in the cure, mitigation, treatment and

prevention of about all of the diseases, ailments or symptoms to which man is subject, including, among others, gonorrhea, syphillis, scarlet fever, diphtheria, diabetes, appendicitis, and rupture. The following appears in Exhibit 17, Articles 5 and 11:

> "5. Stop promptly use of ALL drugs, dopes, medicines, pills, potions, plasters. Spectro Chrome can NOT be combined with other Healing Systems".
>
> "11. Stop all vaccines, serums, injections, antitoxins, immunizations, hypodermics".

The "Home Guide" (page 3) directs the user to subject himself to—

> "No Diagnosis—No Drugs—No Manipulation * * * No Surgery",

and on page 90 directs the patient to

> "Stop Insulin at once * * * eat plenty of raw or brown sugar and all the starches."

It is claimed, on page 57 of the "Home Guide", that all the disorders of the human body are "remedial" by Spectro-Chrome, except that it cannot set a broken bone. Testimony of the claimant as to the benefits his family had received from the machine, and that he intended to use it solely for family use at his home, was elicited by the Court and admitted over the repeated objections of the appellant. (R. pp. 101-111).

As is disclosed by the transcript of the evidence and the District Court's opinion, the Court did not consider any testimony on the question of the alleged forcible manner of seizure from the claimant's home. The Court held the view that, since the machine had been returned to the claimant's home, the entire matter of the manner in which the seizure was made was moot (R. pp. 85, 102), and that the case presented "the clear cut issue whether an instrument, harmless in itself, but accompanied by misleading literature as to the capabilities of the instrument, may be seized against his will from an adult person, compos, who states that he is satisfied with the machine, is being helped by its use, and wishes to keep it." (R. p. 46).[2]

The Court found that the machine was a device within the meaning of the Act, that it was misbranded when introduced into and while in interstate commerce, and that

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(2) It is manifest that the Court intended to and did retain jurisdiction of the res. (See transcript of proceedings in relation to the findings, R. p. 125). Where an article is seized, an entry of a decree is required before any disposition whatsoever can be made of such article. *In re United States,* 140 F. (2d) 19, 20 (C.C.A. 5); *United States v. 893 One Gallon Cans * * * Brown's Inhalant,* 45 F. Supp. 467 (D. Del.). In any event, jurisdiction is not lost by an unauthorized release of the res. See *The Rio Grande,* 90 U. S. 458, and *The Young American,* 30 Fed. 789, 791 (S.D. N.Y.).

jurisdiction existed in the sense that the machine was at all times within the territorial jurisdiction of the Court. (R. pp. 53-55). The Court also found that the claimant had purchased the machine solely for the use of himself and his family in his home, with no intention at any time of transporting, selling or using the machine for any commercial purpose; that the machine and the labeling were not inherently dangerous; and that claimant was satisfied with it, desired to keep it, and did not consent to the entry into his home for any purpose in connection with the case. (R. pp. 55, 56). The Court concluded that the Government was not entitled to a warrant for the seizure of the device from the claimant's dwelling house without his consent; that the machine was not being, or intended to be, transported in interstate commerce; that the machine was not in the course of interstate commerce; and that no interstate transportation was involved because the machine was in claimant's home for his own use, with no intention on claimant's part of transporting or selling it. (R. pp. 56, 57). Accordingly, the Court concluded that claimant was entitled to a judgment dismissing the libel and confirming the return of the device, and entered judgment accordingly. (R. p. 57).

It is evident that the Court tried and decided the case as if the machine had never been seized. The Court proceeded as if the question presented was whether, under the facts

disclosed, a warrant of seizure could properly issue under 21 U.S.C. 334 and the device seized and condemned. Thus, the objection made to the seizure in this case is not that it was wrongfully made. The objection is that the Government lacked the power to make it at all. It is the position of the District Court that the statute does not apply to a seizure in a person's home, and that if it does apply the statute is unconstitutional.

It is the contention of the appellant that the District Court erred in its finding that the machine is not inherently dangerous (R. pp. 56, 135), and in its Conclusions of Law. (R. pp. 56-57, 135-136). The Court's view, as revealed in its opinion, is that the seizure of the device from the claimant's home would be in derogation of the claimant's rights under the Fourth and Fifth Amendments to the Constitution. (R. pp. 47, 48). Appellant maintains that neither the Fourth nor Fifth Amendments applies to 21 U.S.C. 334. Appellant further contends that the location of the machine in claimant's home at the time of the filing of the libel or the issuance of the seizure warrant does not prevent the seizure and forfeiture of the machine, regardless of its alleged innocuous character or its intended use. Appellant contends that the District Court erred in concluding that claimant was entitled to the judgment which was entered in this case. Accordingly, the questions presented on this appeal are:

1. Does the fact that a misbranded device was transported in interstate commerce to a person's home, and retained there ostensibly for his intended personal use, prevent its seizure and condemnation under 21 U.S.C. 334?

2. Does the Fourth Amendment or the Fifth Amendment to the Constitution apply to a seizure made under 21 U.S.C. 334?

SPECIFICATION OF ERRORS RELIED UPON

1. The Court erred in concluding that no interstate transportation was involved in this case and that the device was not subject to seizure because its transportation had ended and the machine had been delivered to the claimant's home.

2. The Court erred in concluding that the seizure of the device in this case under 21 U.S.C. 334 would be in violation of the Constitutional rights of the claimant.

3. The Court erred in entering judgment for the dismissal of the libel and in directing the return of the device to the claimant.

ARGUMENT

INTRODUCTORY STATEMENT

The District Court found that claimant intended to keep the device for his own use and not for commercial use. The

self-serving declaration of the claimant as to his intended use, or the intended use to which the article is to be put, does not divest the Court of its power and obligation to condemn the article. *United States v. 52 Drums Maple Syrup, etc.,* 110 F. (2d) 914 (C.C.A. 2); *Union Dairy Co. v. United States,* 250 Fed. 231, 233 (C.C.A. 7). The only issue is whether the article was misbranded or adulterated when introduced into or while in interstate commerce. *United States v. 2 Bags * * * Poppy Seeds,* 147 F. (2d) 123, 128 (C.C.A. 6).

The District Court also found that the device and accompanying labeling are not inherently dangerous. (R. pp. 55-56). Since the Court was presumably influenced in its decision by such a finding, it is important to observe that the statute makes no distinction in respect to such a characteristic. By its terms, the Act covers articles whose labeling is false and misleading, as well as those which are dangerous to health. *United States v. Lexington Mill & Elevator Co.,* 232 U. S. 399. Accordingly, a finding of no inherent danger may not properly preclude a decree of condemnation.

It is to be noted, however, that there is no evidence to support the finding that the device and accompanying labeling are not in fact inherently dangerous. The libel of information alleges, in paragraph 4, that the device "when

* * * used as directed may delay appropriate treatment of serious diseases, resulting in serious permanent injury or death to the user". (R. p. 7). The directions for the use of the device are contained in the accompanying circulars and pamphlets. The danger to any person in following these directions is apparent in cases of scarlet fever, diphtheria, appendicitis, meningitis, rupture and many other diseases listed in the labeling. Thus, it is a matter of common public knowledge that a person suffering from diabetes must have insulin, and it would be suicidal for such a person to follow the directions in the labeling.

It seems clear, therefore, that the machine is recommended in its labeling as effective as a remedy or cure for a number of diseases which are universally recognized to be fatal unless subjected to proper medical or surgical treatment. The directions established the character of the device as inherently dangerous.

I

A MISBRANDED OR ADULTERATED ARTICLE WHICH HAS BEEN TRANSPORTED IN INTERSTATE COMMERCE IS SUBJECT TO SEIZURE WHEREVER FOUND.

The statutory language (21 U.S.C. 334(a)) authorizing the seizure of adulterated or misbranded articles is clear and unambiguous. Contraband articles are liable to be proceeded against by seizure process while they are "in interstate commerce, or at any time thereafter." There are no restrictions on the exercise of the authority by reason of the place or location of the article, the character of the establishment or place where it may be found, or the use to which it is intended to be put. The section clearly authorizes the filing of the libel and the issuance of the process after transportation has ended, and the making of the seizure at any place the article happens to be at the time it is found.

The District Court declared, however, that the machine, while in the claimant's home, was not being transported in interstate commerce, was not in the course of interstate commerce, had passed beyond its channels, and was in the possession of claimant in his home for his own use with no intention on his part of transporting it. The Court concluded that no interstate transportation was or had at any time been involved in this case. (Conclusion II a, R. p. 57).

It is obvious, however, that there is no foundation for this conclusion. It is contrary to Findings of Fact III and IV (R. pp. 54-55), and is not a legitimate inference to be drawn from the recital which precedes it. This conclusion, however, is one of the bases for the holding of the Court. As such, it denies the power of seizure specifically prescribed by the Act.

The power of the Government to seize and condemn adulterated or misbranded articles after shipment in interstate commerce was first considered by the Supreme Court in *Hipolite Egg Co. v. United States,* 220 U. S. 45, a case which arose under the similar, but more restrictive, provision of the Food and Drugs Act of 1906.

> *21 U.S.C. 14 (1934 ed.)*
>
> Any article of food, drug, or liquor that is adulterated or imsbranded * * * and is being transported from one State * * * to another for sale, or having been transported, *remains unloaded, unsold, or in original unbroken packages,* * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation." (Emphasis added.)

The case involved adulterated eggs which had been shipped in interstate commerce and seized in a bakery factory. It was contended that the District Court had no jurisdiction to proceed in rem against goods which had passed

out of interstate commerce before the proceedings were commenced. In meeting the contention, the Supreme Court said (p. 57):

> "We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the *only limitation of the power to execute such purpose which is urged is that the article must be apprehended in transit or before they have become a part of the general mass of property of the State.* In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdiction over property legally articles of trade. *The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State.* The question in the case, therefore is, What power has Congress over such articles? *Can they escape the consequence of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law.* The power to do so is certainly appropriate to the right to bar them

> from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. *And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages.* The selection of such means is certainly within the breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution." (Emphasis added.)

McDermott v. Wisconsin, 228 U. S. 115, involved a State statute which required that goods, as a condition of their sale within the State, bear the label required by State law and none other. The goods in question had been shipped in interstate commerce and had been received at the retail store of the consignee. The cans had been taken from the shipping boxes and placed upon the shelves for sale at retail. The State statute had been construed to require that the labels required by the Federal law be removed from the cans before the first sale by the importer. The Supreme Court held the statute invalid because the State law was a wrongful interference with the power of Congress over interstate commerce. In answer to the contention that the State regulation was not inconsistent with the Federal Act because the goods on the retail shelves were

exclusively under State control, the Court said (pp. 134, 135):

> "It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original package doctrine as it is said to have been laid down in the former decision of this court. * * * In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the act, and when Sec. 2 has been violated the Federal authority, in enforcing either Sec. 2 or Sec. 10, may follow the adulterated or misbranded article *at least to the shelf of the importer.*
>
> "Congress having made adulterated and misbranded articles contraband of interstate commerce, * * * provides in * * * the act that such articles may be proceeded against and seized for confiscation and con-

demnation while being transported from one State * * * to another for sale, or, having been transported, remaining 'unloaded, unsold, or in original unbroken packages', * * *. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original unbroken packages.' * * * It is enough, *by the terms of the act*, if the articles are unsold, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of Sec. 10 *are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.*" (Emphasis added.)

In the *McDermott* case, the Supreme Court also recognized the practical necessities which impelled Congress to authorize seizure of illicit articles after their interstate transportation:

Page 133:

"* * * it might be noted that as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State and having been transported in interstate commerce, arrive at their destination, *are delivered to the consignee, un-*

boxed, and placed by him upon the shelves of his store for sale." (Emphasis added.)

Page 136:

"The opportunity for inspection enroute may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides 'unsold'." * * *

Note, also, *Seven Cases Eckman's Alterative v. United States,* 239 U. S. 510.

It is equally true that, as a practical matter, the opportunity of inspection or the opportunity for seizure may first arise after the article has been delivered to the consumer, so that the power of seizure at that time is equally appropriate and essential to effect the purpose of the Act.

The conclusion which may properly be drawn from the decisions cited is that, in the exercise of the power to prevent the channels of interstate commerce from being used to enable illicit articles to reach the consumer, Congress may authorize the seizure and condemnation of the articles after transportation has ended. These decisions do not hold that the power of Congress to provide for seizure is limited by the doctrine of original packages, or to articles which "remain unloaded, unsold, or in the original unbroken package." This quoted restriction had been imposed in the 1906

statute and not by the Court. On the contrary, it is said in the *Hipolite* decision that, since the things which were being dealt with in that case were things that Congress had declared to be illegal and contraband, there was presented no dispute over articles of legitimate commerce. Rather, the question was whether "articles which are outlaws of commerce may be seized wherever found." The clear implication from the language used is that such a seizure would be an appropriate means in the exercise of the recognized authority to bar contraband articles from interstate commerce. This was what was done by the 1938 Act. That Act removed the restrictions of the 1906 statute that the article remain unloaded, unsold, or in the original unbroken package, by authorizing seizure of a contraband article "while in interstate commerce, or at anytime thereafter." The purpose is clear—to authorize the seizure of any article, which is contraband when shipped, at any time or place thereafter. The Congressional design is obvious in 21 U.S.C. 334(a) not only "to extend Federal control in this field throughout the farthest reaches of the channels of commerce" (see *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, 567), but in addition "to the farthest reaches of Federal authority" (see *McLeod v. Threlkeld,* 319 U. S. 491, 493).

The obvious purpose thus to enlarge and strengthen the scope of the power of seizure under the present law may

be drawn from the clear intent of Congress to strengthen and enlarge Federal control over foods, drugs, devices, and cosmetics by the enactment of the Act of 1938. The legislative history plainly shows that its general purpose was "to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906," and that the old law contained "serious loopholes and is not sufficiently broad in its scope to meet the requirements of consumer protection under modern conditions" (H. R. Rep. 2139, 75th Cong., 3d Sess., p. 1, Dunn "Federal Food, Drug, and Cosmetic Act", p. 815). This purpose is recognized in *United States v. Dotterweich,* 320 U. S. 277, where the Supreme Court said (pp. 280, 282):

> "The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of the control over illicit and noxious articles and stiffened the penalties for disobedience.
>
> * * *
>
> "* * * Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it."

What is contended for here is an interpretation of the seizure provision of the Act which is consistent both with

the language of the section and the liberal construction which the courts have uniformly declared should be given to food and drug legislation to effectuate its remedial purposes. *United States v. Research Laboratories, Inc.,* 126 F. (2d) 42 (C.C.A. 9), cert. denied 317 U. S. 656; *Arner Co., Inc. et al. v. United States,* 142 F. (2d) 730, 736 (C.C.A. 1), cert. denied 323 U. S. 730; *United States v. 62 Packages, etc., Marmola Prescription Tablets,* 48 F. Supp. 878, 887 (D. Wis.), aff'd 142 F. (2d) 107 (C.C.A. 7), cert. denied *Raladam Co. v. United States,* 323 U. S. 731. Particularly significant is a recent statement of the Supreme Court in *United States v. Dotterweich,* 320 U. S. 277, 280, regarding a criminal prosecution under the Act of1938:

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. *Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."* (Emphasis added.)

There is no indication in the language of the seizure section that it was not intended to cover seizures of contraband articles in a private dwelling. On its face it covers such seizures. It is well-settled that, where the language of a statute is plain and does not lead to absurd results, it is to be accepted by the courts as the evidence of the ulti-

mate legislative intent. *Caminetti v. United States,* 242 U.S. 470; *United States v. Standard Brewery,* 251 U. S. 210, 217. Where there is no exception, the presumption is that none was intended and general terms should be limited only where the liberal application would lead to absurd results. *United States v. Katz,* 271 U. S. 354.[3]

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(3) The scope of the broad language of the seizure section was brought to the attention of Congress. Sec. 2800, one of the predecessors of the bill which was finally enacted as the Federal Food, Drug, and Cosmetic Act, contained substantially the same provision for seizure—"while in interstate commerce or at any time thereafter." At the Senate Hearings (Hearings Before the Committee on Commerce, United States Senate, Seventy-third Congress, Second Session, on Sec. 2800), James F. Hoge, representing the Drug Institute of America, made the following statement (p. 395):

> "The present law permits seizure only while the article to be seized is moving in interstate commerce, or remains unsold or in unbroken original packages. This bill permits seizure while the article is in interstate commerce or 'at any time thereafter', which, I suppose, authorize seizure of articles, which have passed out of interstate commerce and mingled with the general property in the various States, on the shelf of a retailer or in the cupboard of a citizen, if at any time it had been the subject of interstate commerce."

II

A LIBEL FOR CONDEMNATION ACTION UNDER 21 U.S.C. 334 IS NOT A CRIMINAL PROCEEDING.

A seizure action under the Federal Food, Drug, and Cosmetic Act is an action in rem. The Act provides that the procedure "shall conform, as nearly as may be, to the procedure in admiralty", with right of trial by jury (21 U.S.C. 334(b)). The process under Rule 10 of the Admiralty Rules is by warrant of seizure directing the Marshal to take possession of the contraband article. It is intended to liken the proceedings to those in admiralty insofar as the seizure of the article by process in rem is concerned. The proceeding then possesses "the character of a law action, with trial by jury if demanded."[4] This procedure was chosen by Congress as an appropriate and expeditious means to carry out the purpose of the Act.[5]

The theory of the statute is that the seized article itself has violated the law, and the offense is attached to the article. *United States v. 149 Gift Packages, etc.*, 52 F. Supp. 993 (E.D. N.Y.); *United States v. Five Boxes of Asafoetida,*

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(4) *443 Cans of Frozen Egg Product v. United States,* 226 U. S. 172, 183.

(5) *United States v. 935 Cases, etc.,* 136 F. (2d) 523 (C.C.A. 6), cert. denied *Ladoga Canning Co. v. United States,* 320 U. S. 778.

181 Fed. 561 (E.D. Pa.); *United States v. 935 Cases, etc.,* 136 F. (2d) 523 (C.C.A. 6), cert. denied *Ladoga Canning Co. v. United States,* 320 U. S. 778. Under the Food and Drugs Act of 1906 (21 U.S.C. 1 et seq., 1934 ed.), adulterated and misbranded articles were described as "culpable," "illicit articles," "outlaws of commerce" (*Hipolite Egg Co. v. United States,* 220 U. S. 45), and "contraband of interstate commerce" (*McDermott v. Wisconsin,* 226 U. S. 115). The same characterizations undoubtedly are applicable under the comparable provisions of the 1938 statute (21 U.S.C. 334).

The proceeding under 21 U.S.C. 334 is civil in character as distinguished from a criminal or penal proceeding. The criminal provisions in the Act (21 U.S.C. 333) are wholly independent of the seizure provisions. Unlike the situation involved in *Boyd v. United States,* 116 U. S. 616, the seizure proceeding has no relation to any criminal or penal proceeding against the shipper or claimant. *United States v. Five Boxes Asafoetida, supra.* The offense upon which Section 334 is based is attached primarily to the article or device, without any regard to the rights of the shipper or claimant beyond what necessarily arises from the fact that the statute permits the claimant to appear and contest the grounds upon which the forfeiture is based. No provision is made under this section for the enforcement against the owner, the claimant or otherwise, of any penalty or forfeiture

in the nature of punishment for a violation, and the proceeding is distinguishable from that where the forfeiture is deemed to be a punishment inflicted upon the owner in the criminal law sense. *United States v. Three Tons of Coal,* 28 Fed. Cas. 149, 154 (E. D. Wis.): *Dobbins Distillery v. United States,* 96 U. S. 395.[6]

The only issue in the condemnation suit is whether the article has been transported in interstate commerce in violation of the Act, and the only judgment to which the Government is entitled is one directing the condemnation of the offending article and its destruction where it is not brought into compliance with the Act in accordance with the procedure outlined in 21 U.S.C. 334(d).

The Act does not declare the article ipso facto forfeited

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(6) "Cases arise, undoubtedly, where the judgment of forfeiture necessarily carries with it, and as a part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrong-doer for the offense charged, the remedy of forfeiture claimed is plainly one of a civil nature, as the conviction of the wrong-doer must be obtained, if at all, by another and wholly independent proceeding." *Dobbins Distillery v. United States,* 96 U. S. 395, 399.

by an infraction of its provisions. The seizure is made not because the article is forfeited, but because it is subject to forfeiture on account of the violation, and it is essential that the res come into the possession of the Court in order to obtain jurisdiction under the Admiralty Rules. The owner or claimant may appear in the action and contest the issue of adulteration or misbranding by jury trial if demanded. Provision is made whereby the article may be returned to the claimant under bond for the purpose of bringing it into compliance with the provisions of the Act under the supervision of the Federal Security Agency (21 U.S.C. 334(d)).

There is nothing unusual in the seizure of a contraband article in a private dwelling. Provision for the seizure of contraband is made under revenue statutes and other regulatory laws. None of these contains such a limitation on the place of seizure, for the obvious reason that the home is not intended as an asylum for contraband. As is shown subsequently in this brief, the home is not protected against all seizures but only against those which are unreasonable within the meaning of the Fourth Amendment.

III

THE FORTH AMENDMENT DOES NOT APPLY TO A SEIZURE PROCEEDING UNDER 21 U.S.C. 334.

The power of Congress to regulate interstate commerce is plenary and complete in itself, may be exercised to the utmost extent, and acknowledges no limitations other than are prescribed by the Constitution. *Gibbons v. Ogden,* 9 Wheat. 1, 196; *United States v. Darby,* 312 U. S. 100. Thus, Congress may exclude from interstate commerce articles whose use, in the States for which they are destined, it may reasonably conceive to be injurious to the public health, morals, or welfare, or which might spread harm and deception among the people of the several States. *Reid v. Colorado,* 187 U. S. 137; *Lottery Case,* 188 U. S. 321; *United States v. Darby, supra; Hipolite Egg Co. v. United States,* 220 U. S. 45. It is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the States. *Seven Cases of Eckman's Alterative v. United States,* 239 U. S. 510, 514-515. See *Carolene Products Co. v. United States,* 323 U. S. 18.

The Commerce Clause permits Congress to avail itself of any means deemed appropriate by it to the effective exercise of the power to regulate interstate commerce, irrespective of the intrastate nature of the transaction or activity

controlled. *United States v. Wrightwood Dairy Co.,* 315 U. S. 110; *Wickard v. Filburn,* 317 U. S. 111. The essential purpose of the Federal Food, Drug, and Cosmetic Act, and particularly of 21 U.S.C. 334, is to "prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food". *McDermott v. Wisconsin,* 228 U. S. 115, 131. It seems clear, therefore, that the exercise of the commerce involved in the instant case is not invalid unless it violates a specific prohibition contained in the Constitution. It is the view of the District Court that in the instant case the Fourth Amendment to the Constitution was violated.

The Fourth Amendment, however, does not denounce all seizures, but only such as are unreasonable. It is to be construed in the light of what was deemed unreasonable when it was adopted, and in a manner which will conserve public interest as well as the interests and rights of the citizen. *Carroll v. United States,* 267 U. S. 132. The language of the Amendment does not prohibit all seizures in a home or guarantee against all such seizures without a search warrant. It is recognized in *Gouled v. United States,* 255 U. S. 298, 309, that there is a "primary right" to search and seizure which "may be found in the interest which the public or the complainant may have in the property to be seized, * * * or when a valid exercise of the police power renders

possession by the accused unlawful and provides that it may be taken." Without attempting to define their scope, it may be said that most of the decisions defining or upholding rights under the Fourth Amendment deal with the attempted use as evidence in a criminal case of papers or documents, otherwise wholly innocuous, taken or obtained from the premises of the accused. It is pointed out in such cases that, where the seizure of the papers or documents could only be for the purpose of their use in evidence against the accused, it would be impossible for the Government to have such an interest in the property that it would have the right to take the property into possession in the carrying out of some recognized authority. See *Gouled v. United States, supra.* In other cases, the use *as evidence* of contraband articles illegally taken from the accused is condemned. See *Amos v. United States,* 255 U. S. 313; *Agnello v. United States,* 269 U. S. 20.

However, it was never intended that articles of contraband could not be *recovered* from a private dwelling when it is not intended to use such property in violation of a Constitutional right, or that the Constitutional provision should provide an asylum for the protection of such property or prevent its seizure wherever it may be found. A distinction is always made between property of which the Government is entitled to possession and property of which it is not. See

Davis v. United States, 66 S. Ct. 1256. As is pointed out in *Boyd v. United States,* 116 U. S. 616, 623:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.[7]

If the property is contraband by reason of its character as lottery tickets or illicit liquor, or otherwise, it may be subjected to seizure for the reason that the thing in such case

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(7) "The two things differ toto coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements, or gambling, etc., are not within this category. Many other things of this character might be enumerated." *Boyd v. United States, supra.,* pp. 623, 624.

is primarily considered as the offender, and the taking cannot be held to be unreasonable under the Fourth Amendment.

Misbranded or adulterated articles shipped in interstate commerce are considered outlaws of commerce (*McDermott v. Wisconsin,* 228 U. S. 115, 128), whose "confiscation or destruction are special concern of the law." "We are dealing, * * * with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them * * * and the shipper of them." *Hipolite Egg Co. v. United States,* 220 U. S. 45, 57. Clearly, it is the design of the Act to place such illicit articles in the same category as goods which have been stolen, coin which is counterfeit, and other things of the character referred to in *Boyd v. United States, supra.* By providing for their seizure and forfeiture as an appropriate means of enforcement, the Act declares that the Government's right to their possession is prior and superior to that of any person.

The procedure under 21 U.S.C. 334 requires the filing of the libel and the issuance of a process in accordance with the Admiralty Rules. Rule 10 provides that "the process, if issued * * * shall be by a warrant of arrest of the * * * goods, or other thing to be arrested; and the Marshal shall thereupon arrest, and take the * * * goods, or other thing

into his possession for safe custody." The term "arrest" imports an actual seizure of the property (*Yokohama Specii Bank, Ltd. v. Chengting T Wang,* 113 F. (2d) 329 (C.C.A. 9)), and Section 334(b) provides "The article shall be liable to seizure by process pursuant to the libel."[8]

As previously shown, the proceeding is civil and not criminal and involves only the seizure and condemnation of the contraband article. Obviously, the process is a civil process in the nature of a civil attachment and has no relation whatsoever to criminal proceedings. The protection of the

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(8) Unlike 21 U.S.C. 334, and similar to seizure cases in admiralty, statutes such as the prohibition, customs, and tariff acts have authorized forfeiture proceedings *preceded* by an initial executive seizure of the property. In such cases, as the Supreme Court has stated, "anyone may seize any property for forfeiture to the Government, and * * * if the Government adopts the act and proceeds to enforce the forfeiture by legal process, this is of no less validity than when the seizure is by authority originally given. * * * The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. * * * We can see no reason for doubting the soundness of these principles when the forfeiture is dependent upon subsequent events any more than when it occurs at the time of seizure. * * * The exclusion of evidence obtained by an unlawful search and seizure stands on a different ground." *Dodge v. United States,* 272 U. S. 530, 532.

Fourth Amendment does not extend to a process of that character. As is stated in *Boyd v. United States,* 116 U. S. 616, 624, "The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendments, or any other clause of the Constitution; * * *" In *Murray's Lessee v. Hoboken Land and Improvement Co.,* 18 How. 272, which involved a warrant of distress against deliquent collectors of Federal revenues, it is held that the Fourth Amendment has no reference to such proceedings.[9]

The decisions reveal that the Fourth Amendment is not intended to apply to seizures under 21 U.S.C. 334. In *United States v. 935 Cases Tomato Puree,* 136 F. (2d) 523 (C.C.A. 6), cert. denied *Ladoga Canning Co. v. United States,* 320 U. S. 778, there was involved the seizure and condemnation of adulterated food under 21 U.S.C. 334. The claimant moved to quash the warrant for the seizure, and the seizure of the goods, on the ground that since the libel of information filed by the United States Attorney had not been verified, the warrant for seizure was issued

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(9) A private dwelling is not protected against a levy on goods under an attachment (7 C.J.S. 393), or execution (33 C.J.S. 242).

and the seizure was made without a showing of probable cause supported by oath, etc., in violation of the Fourth Amendment. In answer to this contention, the Circuit Court of Appeals for the Sixth Circuit said that under the Act the proceedings are in rem in accordance with the Admiralty Practice, and that the Rules of Admiralty do not require the libel to be verified. The Court declared that Congress had the full power to carry out the purpose of the Act, and that the procedure prescribed was appropriate to that end. The point was stressed that the proceeding was not, in any aspect, a criminal case, but a libel in rem which undoubtedly was a civil action. The Court pointed out that no significance should be attached to the words "warrant of arrest" in the Admiralty Rules, because its usage bears no resemblance to the word "warrant" in the Fourth Amendment. The conclusion was that the seizure in the manner prescribed under the Act was not an unreasonable seizure in contravention of the Amendment.

In *United States v. Eighteen Cases of Tuna Fish,* 5 F. (2d) 979 (W.D. Va.), involving the similar seizure provision in the Food and Drugs Act of 1906 (21 U.S.C. 14 (1934 ed.)), it was the view of the Court that the Fourth Amendment was not intended to apply to an attachment for the seizure of property; that there was no historical evidence of abuses in respect to writs of attachment prior to the adoption of the Fourth Amendment, and, therefore, no

reason for an intent to correct them. To the same effect is *United States v. 62 Packages, etc., Marmola Prescription Tablets,* 48 F. Supp. 878 (W. D. Wis.), aff'd 142 F. (2d) 107 (C.C.A. 7), cert. denied *Raladam Co. v. United States,* 323 U. S. 731. *United States v. Eight Packages, etc.,* 5 F. (2d) 971 (S.D. Ohio), is to the contrary, but the Court had an erroneous conception as to the nature of the proceeding, and the decision is overruled in the *Ladoga Canning Company case, supra.*

Although the question of a seizure in a private dwelling was not involved in the above cases, we fail to see how the fact that the article is being held by the owner in his private dwelling distinguishes the instant case. The rationale of these decisions is that the proceeding, which is an in rem action against the article, is civil in character and does not involve the rights of a person except as may result from the determination of the issue as to the illicit character of the article and its disposition. The seizure of the property is necessary as a condition to the jurisdiction of the Court in the in rem proceeding under the Admiralty Rules. This procedure has been upheld as an appropriate and legitimate means of enforcement, and the taking of the property is a necessary step in the proceeding. Under 21 U.S.C. 334 the property is seized only for the purpose of condemning it as contraband. The rights of the claimant are fully protected by a trial—by jury if demanded. If the property is capable

of legitimate use, it may be returned under bond for reconditioning (21 U.S.C. 334(d)).

The contention of the claimant is in effect that, although illicit and harmful articles are otherwise subject to seizure, they acquire an immunity when placed in a home. It is obvious that there can be no basis for such a contention. The fact that an illicit article may be found in a private dwelling certainly does not change its character or the nature of the proceeding. If such were the protection guaranteed by the Constitution no seizure at all could be made, even under a search warrant properly issued under a statute which contained the authorization. It is clear that no such guarantee exists. The Constitutional provision is not designed to protect the possession of illicit contraband articles, but to protect against arbitrary and unreasonable seizures that invade rights in legitimate property.

IV

THE OPERATION OF 21 U.S.C. 334 DOES NOT VIOLATE THE FIFTH AMENDMENT.

The District Court concluded that the right of personal liberty under the Fifth Amendment, what the Court described as the "right to control the manner in which a person shall seek to cure himself", had been denied. (R. pp. 48-49). Since the classic statement in *McCullough v. Mary-*

land, 17 U. S. 316, the doctrine has been continuously reaffirmed that within its recognized authority Congress may adopt such measures, having reasonable relation to the end sought, as it may deem necessary to make its action effective. As already indicated, in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations. *Hamilton v. Kentucky Distillery Co.,* 251 U. S. 146; *Brooks v. United States,* 267 U. S. 432, 436; *Kentucky Whip & Collar Co. v. I.C.R. Co.,* 299 U. S. 334, 346. The Fifth Amendment imposes no greater limitation upon the national power than the Fourteenth Amendment on the State power. *Hamilton v. Kentucky Distillery Co., supra.*

The Constitution does not always prevent interference with private affairs. The Supreme Court has stated that, although the use of property is normally a matter of private and not of public concern, property rights are not absolute, for equally fundamental with the private right is that of the public to regulate it in the common interest. It has said that:

> "No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of a citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as it has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York,* 291 U. S. 502, 523-4-5.

In considering the limitations on the police power of the States or the power over interstate commerce of the Federal Government, it is well-settled that questions of policy wisdom and expediency are for legislative determinations, which will not be disturbed unless the regulation has no relation to the end for which the power is exercised. The action of the legislature is final unless the measure adopted appears clearly to be arbitrary or to have no relation to the object sought to be obtained. *United States v. Carolene Products Co.,* 304 U. S. 144; *Carolene Products Co. v. United States,* 323 U. S. 18; *Otis v. Parker,* 187 U. S. 606, 609; *Purity Extract Co. v. Lynch,* 226 U. S. 192; *Everhard's Brewery v. Day,* 265 U. S. 545.

It is the acknowledged power of Congress to prevent the facilities of interstate commerce from being used to

place misbranded or adulterated articles before the consumer. *McDermott v. Wisconsin,* 228 U. S. 115; *Seven Cases of Eckman's Alterative v. United States,* 239 U. S. 510. And it was long since held in *Hipolite Egg Co. v. United States,* 220 U. S. 45, that the similar seizure provisions in the Food and Drugs Act of 1906 were an appropriate means in the exercise of a Constitutional power, the selection of which was certainly within the breadth of discretion vested in Congress. As pointed out, the implication of that decision is that there need be no limitation as to the place of seizure. It must, therefore, stand as admitted that the Government, consistent with the due process clause, may forbid the shipment of illicit articles in interstate commerce, and that the seizure of the contraband article anywhere within the jurisdiction of the Federal Government is an appropriate and Constitutional means to make the prohibition effective. What, then, is the right in such property which is capable of any protection under the Fifth Amendment? A person in possession of forfeited property has no right to the protection of his possession against the United States. Such property is always rightfully subject to seizure on behalf of the Government. *Milan v. United States,* 296 Fed. 629 (C.C.A. 4), cert. denied 265 U. S. 629; *United States v. McBride,* 287 Fed. 214 (S.D. Ala.), aff'd 284 Fed. 416 (C.C.A. 5), cert. denied 261 U. S. 604; *Boyd v. United States,* 286 Fed. 930 (C.C.A. 4); *Glennon v. Britton,*

40 N. E. 594 (Ill.); *State v. Derry,* 85 N. E. 765 (Ind.); *Dodge v. United States,* 272 U. S. 530. It is said generally that there can be no Constitutional protection against the seizure of property which is designed to perpetrate a fraud upon the public, providing it is taken in a Constitutional manner. *Gouled v. United States,* 255 U. S. 309. It is very doubtful whether there can be any property or possessory right in contraband property which may be protected under the Constitution against Congressional enactment. *Sligh v. Kirkwood,* 237 U. S. 52, 59; *Zeffrin, Inc. v. Reeves,* 308 U. S. 132. It follows that there can be no protected right in an article which has been transported in violation of the Act and is, therefore, of an illegal and contraband character.[10]

The device involved acquired its character as contraband by reason of its illegal transportation. It became liable to forfeiture the moment it was introduced into interstate commerce, and before it came into the possession of the claimant. Its subsequent possession by the claimant in his

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(10) Even a concededly illegal seizure of contraband does not prevent its condemnation and forfeiture. *United States v. One Studebaker, etc., Sedan,* 4 F. (2d) 534 (C.C.A. 9); *United States v. Eight Boxes, etc.,* 105 F. (2d) 896 (C.C.A. 2); *Dodge v. United States,* 272 U. S. 530. The rule is the same even though the article was seized from a home without a search warrant. See *Bourke v. United States,* 44 F. (2d) 371 (C.C.A. 6).

home did not change its illegal character, or its status as subject to the seizure provisions of the Act.[11] The device is still the very unlawful thing transported contrary to law. As we have shown, the law draws a distinction between things forfeited or illegal, and property or effects which may legally be owned and held.

The fallacy in the District Court's conclusion that the seizure of the device would violate the claimant's Constitutional rights because it was in his home for his own personal use is that it fails to take into account the character of the property thus sought to be protected. It fails to take into consideration the acknowledged power to keep illicit and harmful articles out of the channels of commerce, and to make them outlaws of such commerce and thus give to them the character of contraband subject to forfeiture.

It must follow that, whether the taking of an article from a private dwelling is in itself unreasonable is to be determined by the character of the property and the manner of the seizure—the same test as in the case of other contraband such as stolen property, illicit liquor, or lottery tickets. If these last-named articles are capable of seizure in a home under a search warrant properly issued and executed under

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(11) Certainly there is no assurance that the article will be retained in the private home, or that it will be used only by those who reside there.

the applicable law, there can be no valid objection to the seizure of adulterated or misbranded articles under a warrant of monition issued pursuant to 21 U.S.C. 334.

We contend that the District Court mistakes the case if it rests its decision on the proposition that the appellant does not have the right to declare what implements the claimant may use in his own home for his own personal use. The appellant does not venture to make any such declaration. It is not the use of the contraband article which the appellant undertakes to manage but the traffic in it. There is no design to interfere with the right of the individual to select his own manner and means of treatment, and it is plain that the claimed interference with this right in this case is entirely incidental. Even so, acts innocent or not in themselves subject to regulation are often restricted as an incidental result of the legislative choice of appropriate means to make the regulation effective. *Purity Extract Co. v. Lynch,* 226 U. S. 192; *Clark Distillery v. Western Md. Ry. Co.,* 242 U. S. 311; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.,* 299 U. S. 334. "*It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government*". *Purity Extract Co. v. Lynch,* 226 U. S. 192, 201. (Emphasis added.)

And on the question of individual use, the Supreme Court said in *Clark Distillery Co. v. Western Md. Ry. Co.,* 242 U. S. 311, 320, which involved a question of the power of the State to enact a prohibition law consistent with the due process clause of the Fourteenth Amendment: "Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use were permitted." Admittedly the seizure of any illicit food, drug, or device restricts the rights of all those who would choose to use such article, but this is no valid objection. The liberty safeguarded under the Constitution is not an absolute or uncontrollable liberty.[12] "* * * the liberty safeguarded is a liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *West Coast Hotel*

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(12) "Neither is it an effective objection to a statute if some of those will be protected by its provisions oppose such protection, for the state has such an interest in the welfare of its citizens that it may, if necessary, protect them against even their own indifference, error or recklessness." *People v. Charles Schweinler Press,* 108 N. E. 639, 642 (N.Y.), Ann. Cas. 1916D 1059, 1062, writ of error dismissed, 246 U. S. 618:"

Co. v. Parrish, 300 U. S. 379, 391. The District Court indicated the possibility of interference with trivial matters. But the possibility of an unwise use of power does not establish that the power does not exist. See *United States v. Dotterweich,* 320 U. S. 277, 285.

CONCLUSION

For the foregoing reasons, we respectfully submit that the District Court erred in holding that the claimant was entitled to a return of the "Spectro-Chrome" device, and in entering judgment directing its return to claimant. Since it is admitted that the device was misbranded when introduced into and while in interstate commerce, we urge that the judgment be reversed and the District Court directed to enter a decree for appellant as prayed for in the libel.

THERON L. CAUDLE,
Assistant Attorney General

HENRY L. HESS,
United States Attorney,
District of Oregon

J. ROBERT PATTERSON,
Assistant United States Attorney.

Of Counsel:

VINCENT A. KLEINFELD,
Attorney, Department of Justice

JOHN T. GRIGSBY,
Attorney, Department of Justice.

No. 11403

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM RAY OLSEN, claimant of One Article of device labeled in part "Spectro-Chrome."

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United State for the District of Oregon.

BARNETT H. GOLDSTEIN,
Failing Building,
Portland, Oregon,
Attorney for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND

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CITATIONS

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BRIEF OF APPELLEE

Upon Appeal from the District Court of the United State for the District of Oregon.

STATEMENT OF THE CASE

On June 14, 1945 there was shipped in interstate commerce from Newfield, N. J., to the home of the claimant, William R. Olsen, Portland, Oregon, a machine labelled "Spectro-Chrome", which was represented by the shipper to have certain curative benefits. It was received in Portland on or about June 25, 1945, by Olsen, who paid for the machine, and it was kept con-

tinuously in his home and was used exclusively by himself and his mother, to secure relief from their ailments. They were perfectly satisfied with the results attained therefrom.

More than a month later, to-wit: July 28, 1945, a deputy U. S. Marshal forcibly entered the private home of Olsen, and over his protests forcibly seized and removed this machine (Affidavit of Olsen—Tr. p. 27).

The U. S. Marshal, in forcibly entering this private home, had no warrant of arrest, had no search warrant, but purported to act under a warrant of seizure issued upon a libel of condemnation filed by the United States Attorney, acting upon instructions of the Federal Security Agency, and without any showing of probable cause, supported by oath or affirmation of personal knowledge.

It was stipulated, subject to the objection as to its competency and materiality, that the machine, when introduced into and while in interstate commerce, was accompanied by printed matter containing a number of misleading and false statements as to the cures that could be effected by this machine.

It was asserted by the claimant, without contradiction, that the machine when seized and taken from his home was not mislabeled or misbranded; that it had found permanent lodgment in his home; was intended for his personal use only, and was not intended for the purpose of resale or reshipment. (Affidavit of Olsen—Tr. p. 27) (Testimony of Olsen—Tr. p. 100-111).

Pending the trial of the cause, upon motion of the claimant to restore the machine to him, the court granted

the motion and the machine was returned.

Upon the trial on its merits, the court made findings of fact which included the following:

a. That the machine was not inherently dangerous.

b. That the claimant did not consent to the entry in his home for any purpose connected with the case.

c. That the machine was acquired for the sole and exclusive use of himself and members of his family, and that it was at all times kept in his home and possession for such purpose, with no intention at any time to transport, sell or use the machine for any commercial purpose.

d. That the claimant and his mother had been helped in the treatment of their bodily ailments.

Based upon these findings the court, in dismissing the libel held:

1. That the machine at the time of its seizure from the private home of the claimant had passed beyond interstate commerce channels; that it was exclusively within the home and possession of the claimant for his own use, with no intention of transporting or selling the same, and that therefore no interstate transportation was involved in the case.

2. That the claimant and members of his family were entitled to use the machine for treatment of their bodily ailments without interference by the Government or its agents.

The opinion of the trial court is set out on page 45 of the transcript of record, and is reported in *U. S. vs. One Article "Spectro-Chrome"*, 66 Fed. Sup. 754.

I.

Federal Regulation and Control of Contraband Articles Shipped in Interstate Commerce Ceases When the Articles Have Passed Beyond Interstate Commerce Channels and Are Exclusively Within the Possession of a Private Individual, and Are Kept for His Own Personal Use With No Intention of Transporting or Selling the Same.

The Government in this instance attempted to extend its power under the commerce clause of the Constitution by the seizure of an alleged article of contraband from the private home of an ultimate purchaser long *after* the interstate transportation had ended, and notwithstanding that at the time of the seizure the article itself was not misbranded, was not injurious per se, and was being kept and used by the purchaser and his family for their personal use, and with no intention of resale or retransportation.

It is impliedly conceded by the Government that prior to the enactment of the 1938 Food, Drug and Cosmetic Act, the 1906 Food and Drug Act did not authorize the seizure for condemnation of a contraband article from the private home of an ultimate purchaser or user thereof, but it is contended that the 1938 Act granted such power by the words of the Statute, that a misbranded article introduced in interstate commerce may be proceeded against "while in interstate commerce *or at any time thereafter.*" It is in the italicized words that the Government claims its authority to pursue the

offending article even in the privacy of a home, and even though it had long ceased to be a medium of interstate traffic or sale. Such a claim, aside from being legally unsound, ignores reality and would result in such defiance of Constitutional guarantees as to forbid judicial sanction. (*Federal Trade Commission vs. American Tobacco Co.,* 264 U.S. 298—32 A.L.R. 786).

Such a construction of the Act by the Government is clearly unwarranted when the Act is read in its entirety, and when considered in the light of the constitutional limitations on Congress in its regulation of interstate commerce.

In construing a statute, it is fundamental that the whole Act must be considered together, and not considered separately in parts or in sections. Each part or section must necessarily be considered in connection with every other part or section, for the law is passed as a whole and is animated by one general purpose and intent, which, in this instance was to *prohibit the traffic of certain misbranded articles and drugs in interstate commerce* (*U. S. v. 65 Casks,* 170 Fed. 449—175 Fed. 1022). When so considered, the words used in the seizure section of the Act (sec. 334) authorizing the seizure of the article "at any time thereafter", simply means at any time *while the article is still a medium of traffic in interstate commerce.* This is borne out by referring to the section of the Act defining the Acts that are prohibited (Sec. 331), among which prohibited Acts is the Act of removing the label from an article *while it is held for sale and shipment in interstate commerce.*

It will be particularly noted that there is no prohibition against the possession for personal use of a misbranded article after it had passed from the channels of interstate commerce, and the interstate character of the shipment had ended. Indeed, no such power is vested in Congress (*U. S. vs. 65 Casks,* supra). It might likewise be pointed out that neither does it prohibit the possession for home consumption of adulterated food. Yet by what reasoning can the Government claim that this Act, when read in its entirety, gives it the right to invade the privacy of a home to seize a device that is not inherently dangerous, when it makes no claim that it is empowered to enter a private home to seize from its cupboards adulterated food that had been purchased for home consumption? Moveover, the Act is significantly silent as to the purchaser or consignee of articles with respect to the use of the goods which have ceased to move in channels of interstate commerce and have acquired a situs within the State, subject only to the regulatory powers of the state.

The words "at any time thereafter" must not only have some rational and reasonable connection with the acts that are prohibited in the Food, Drug & Cosmetic Act but when considered with respect to the authority of the Government to seize and confiscate, such words must have some real or substantial relation to or connection with the powers of Congress to regulate interstate commerce, or else it would clearly be in conflict with its constitutional limitations. (*Adair vs. U. S.,* 248 U.S. 161) (*McDermott vs. Wisconsin,* 228 U.S. 115).

The Government's contention, in effect, is that under the law, as it construes it, the impress of interstate commerce when once acquired is never removed, but like Tennyson's Brook "goes on forever"; that it is therefore empowered to pursue the offending article at any time and in any place, no matter how long after the article had ceased to be a medium of interstate commerce, and no matter even if the article had found permanent lodgement in the privacy of one's home where it was being kept and used without in any manner interfering with or affecting the rights of others. In brief, that the article is *never* immune from pursuit and seizure by the Federal Authorities, wherever it may be found!

Such a contention is unreasonable and illogical and if the Government's agencies persist in adopting this construction by further invasion of private homes in their pursuit and seizure of these or like machines, as it threatens to do, it would certainly lead to results never contemplated by Congress, and certainly not by the framers of the Constitution. There surely must be some period of time when the article or device shipped in interstate commerce loses its character of an interstate shipment, and therefore ceases to be subject to the provisions of the Act. Certainly when it reaches the private home of the consignee and is intermingled with his personal property and has completely passed from the control of the shipper, and loses its distinctive character as a shipment in interstate commerce, the power of the Government to control and regulate same is at an end.

We therefore submit that to adopt the construction of the act as urged by the Government, would be repugnant to the Constitution in two ways; first, it would transcend the authority delegated to Congress to regulate interstate commerce, and, second, it would attempt to exercise police powers over matters purely local, to which the Federal authority does not extend. (*Hammer vs. Dagenhart,* 247 U.S. 351—3 A.L.R. 649).

The power delegated to Congress to regulate interstate commerce is the power to prescribe rules by which such commerce is to be governed. It certainly does not include the exercise of authority over commodities that had passed beyond the channels of interstate commerce, and had come to a permanent rest at the point of destination. (11 Am. Jur. 18) (15 C.J. (2d) 96) (*U. S. vs. 5 Boxes of Asafaetida,* 181 Fed. 561, 567) (*U. S. vs. 2 Bags,* 154 Fed. Sup. 706) (*Hypolite Egg Co. vs. U. S.,* 220 U.S. 45).

In a recent decision, this court, in the case of *U. S. vs. Phelps Dodge Mercantile Co.,* 157 Fed. (2d) 453, held that libel proceedings under the Federal Drug and Cosmetic Act could not be enforced against alleged adulterated food two years after it had ended its interstate journey, and had come to rest in the consignees' warehouse.

The case of *Schechter vs. United States,* 295 U.S. 495, 97 A.L.R. 947 is in point. We submit the pertinent parts of this opinion:

"Were these transactions 'in' interstate commerce?
* * * *

"The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers.

"Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. * * * *

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation.

"The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased.

"The poultry had come to a permanent rest within the State. It was not held, used or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other States."

The Government has not submitted a single authority or offered any logical reason in support of its contention that it might pursue an alleged contraband article at any time and at any place after the article has ceased to be a medium of traffic in interstate commerce. Its argument in its brief contradicts this contention. "It is not the *use* of the contraband article which the appellant undertakes to manage, but the *traffic in it.*" (Appellant's Brief, Page 44). Yet at the time of the seizure, no traffic was involved or contemplated! It had

long since ended. The article had mingled with the personal property of the respondent. The Government's control thereover had long ceased and if it was at all subject to regulation, it was subject to State not Governmental control.

The object of the law which must find its authority within the commerce clause of the Constitution, is to keep misbranded articles out of the channels of interstate commerce, and certainly the law cannot be enlarged to include the exercise of police powers that exclusively belong to the state where the article had found permanent lodgment, and if the seizure of this article in this instance does not come within the commerce clause, then it would be invalid whether it involved the exercise of police powers or not. (*Nick vs. U. S.,* 122 Fed. (2d) 660).

The Government's argument that "once contraband —always contraband", as applied to this machine, so that it could not even be the subject of lawful ownership and find asylum in a private home, is as inept as is its citation of cases involving the possession of illicit liquor, narcotics, counterfeit money and the like, the possession and use of which is specifically made illegal.

No law has yet been enacted, Federal or State, that makes illegal per se the possession and use of a machine consisting merely of a cabinet, containing an electric light bulb, a container for water, glass condenser, lenses and glass slides of different colors. It is comparable to the numerous types of ultra violet ray machines, infra red ray machines and other ray disseminating devices

that are in thousands of homes, without molestation or interferences, *thus far,* by zealous partisans of medical healing. Yet notwithstanding the harmless character of this machine, the Government seeks to extend its control thereover on the theory that it once having been shipped in interstate commerce it is an "outlaw" and therefore subject at any time to seizure, even from a private home, under the powers of Congress to regulate in the interest of public welfare. In this connection, we call attention to the case of *Carter vs. Carter Coal Company,* 298 U.S. 239, which holds that Congress has no general powers to regulate for the promotion of the general welfare, and that its powers *must* be found in those granted to it to regulate commerce.

The Supreme Court has frequently said that the United States lacks the police power, for that was reserved to the States by the 10th Amendment. In other words, that the Federal Government has no general governmental authority outside the powers granted to it, and the power granted to it so far as this case is concerned, is the power to regulate interstate commerce. We repeat and reiterate that in the exercise of such restricted powers, the Government can exercise no jurisdiction over an article that has long ceased to be a medium of traffic in interstate commerce, and that any attempt so to do is outside the scope of the authority confided in Congress by the Constitution.

II.

Federal Regulation and Control Over Interstate Commerce Subject to Limitations and Guarantees of the Constitution Providing That No Person Shall Be Deprived of His Property Without Due Process of Law and That He Shall Be Secure Against Unreasonable Search and Seizure.

The power to regulate commerce does not carry with it the right to destroy or impair the limitations and guarantees which are contained in other provisions of the Constitution, and the authority to Congress over commerce cannot be made a means of exercising powers not entrusted by the Constitution. (11 Am. Jur. 15). (*McDermott vs. Wisconsin,* supra).

As previously pointed out, the Government's sole reliance for its unusual and extraordinary action in this case, is due to its strained and labored construction of the words "at any time thereafter", which it maintains confers such authority. Assuming that such construction were even permissible so as to make the offending article still an object of interstate commerce and therefore subject to regulation by Congress, it must not be overlooked that such regulation is not absolute, but is subject to the limitations and guarantees of the Constitution.

As pointed out by Mr. Justice Holmes in the case of *Federal Trade Commission vs. American Tobacco Company,* 264 U.S. 298, 2 A.L.R. 786:

> "We cannot attribute to Congress an intent to defy the 4th Amendment or even to come so near doing so as to raise a serious question of the constitutional law. * * * Anyone who respects the spirit as well as the letter of the 4th Amendment would be loathe to believe the Congress intended to authorize one of its subordinate agencies to sweep our traditions into the fire."

The forcible seizure of this machine from the private home under the circumstances in this case, was most arbitrary and tyranical and more in keeping with the practice of Nazi Rule, and not of a free democracy, which guarantees the sanctity and security of the home. Verily, freedom flies out of the window when force comes in at the door!

Historical arbitrary seizure has been one of the great grievances against despotic power. In these days the reason for the protection of persons and property and the fact that they are protected are almost forgotten in the paucity of the attack upon them. Yet how the protection was wrung from reluctant tyrants must always be borne in mind and no action can be sanctioned which would tend to weaken the great safeguard of our liberties and permit encroachment thereon which might be justified by authority of law or by judicial interpretation. (*U. S. v. 8 Packages,* 5 Fed. (2d) 971) (47 Am. Jur. 507).

Our courts have thus far jealously enforced the principles of a free society secured by the prohibition of unreasonable search and seizure. Its safeguards are not to be worn or whittled away by a process of devitalizing interpretation.

If the house of a man is to be regarded and respected as a refuge for himself, a place of safety for his property and of repose for his family, in brief, a sanctuary,—upon what reasonable basis can the Government justify its conduct, particularly where the Marshal was armed with a civil and not a criminal process.

The general rule is that an officer cannot force his way into a dwelling house to execute civil process, whether he be armed with a writ of attachment (4 Am. Jur. 893), or with a writ of execution (21 Am. Jur. 70). This is so because the law ever jealous of intrusion on domestic peace and security, regards every man's home as his castle. (*Legman vs. U. S.,* 295 Fed. 474, C.C.A. 3rd Cir.). Certainly the writ of libel carried no greater authority.

As stated by the court in the case of *Weeks vs. U. S.,* 232 U.S. 383:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law."

The Supreme Court of the United States in a series of decisions, which have been consistent in their tenor, has clearly indicated that it does not and will not sanction lawless and unconstitutional conduct of governmental agencies in their disregard of the protection given to all alike by the Constitution of the United States, against unreasonable search and seizure of one's prop-

erty (*Gouled vs. U. S.,* 255 U.S. 298; *Amos vs. U. S.,* 255 U.S. 313; *Agnello vs. U. S.,* 269 U.S. 20; *U. S. vs. Lefkowitz,* 285 U.S. 452; *Go-Bart vs. U. S.,* 285 U.S. 334; *Boyd vs. U. S.,* 116 U.S. 616).

These cases all recognize, not only the binding force of the Constitutional prohibition against unreasonable search but its high necessity to protect the sanctity of the home and privacies of life, and that its protection is so broad and ample that it embraces all persons and that the duty of giving it full effect rests upon all entrusted under our Federal system with the enforcement of the laws.

Moreover it will be noted that the libel proceeding filed by the Government was not verified by any person having knowledge of the facts, and failure of such verification, nullifies the warrant issued thereunder (*U. S. vs. 8 Packages,* 5 Fed. (2d) 971). While this decision is challenged by the opinion in the case of *U. S. vs. 935 Cases,* 136 Fed. (2d) 523, the opinion therein specifically pointed out "that there is no element of search or invasion of the privacy of a citizen or of his home involved in the case at bar".

Among the inalienable rights declared by our Constitution as belonging to each citizen is the right of acquiring and possessing property. For the Constitution to declare a right inalienable and at the same time leave to Congress unlimited power over it, would be to destroy, not to conserve, the rights it vainly assumes to protect, thereby reducing the constitutional amendments to a form of words.

While it may be conceded that Congress has power to make regulations in aid of prohibiting interstate shipments of misbranded articles and adulterated food, such regulations, if at all enforcible, after the interstate shipment had ended, must be germane to the purpose sought to be accomplished, that is, the prevention of the exploitation of such articles for the purpose of resale or retransportation. In other words, there must be a direct relationship to the objects sought by the Act. There is no rational basis whatsoever for an arbitrary fiat that the use of this machine is dangerous to public health, and to attempt to condemn and confiscate same when not intended for sale or transportation simply because it had at one time been introduced in interstate commerce, does violence to the due process clause of the Constitution. In brief, Congress has no power under the guise of regulating commerce to interfere with personal rights, thereby infringing upon and defying constitutional guarantees. (11 Am. Jur. 992, 994) (12 Am. Jur. 344) (*Nick vs. U. S.,* supra) (*Carter vs. Carter Coal Co.,* supra).

As expressed in the opinion in the case of *Wright vs. Hart,* 182 N.Y. 330, 74 N.E. 404:

> "Broad and comprehensive as the police power concededly is, and incapable of precise definition or exact demarcation as we know it to be, it is never difficult to determine that its limits have been transcended when it is clear that the sacred domain of the Constitution has been trespassed upon, and, when the exercise of the police power clearly infringes upon vested constitutional rights, courts should not concern themselves with the probable purposes for which it is exercised."

Both these Amendments (4th and 5th) contemplated perpetuating in their full efficacy by means of constitutional provisions, the principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity free from the possibilities of future legislative change (*Boyd vs. U. S.,* 116 U.S. 616).

We therefore submit that even if the Food, Drug and Cosmetic Act were so interpreted and construed as to authorize proceedings against this machine on the theory that it was still a subject of interstate commerce, it cannot be permitted to do violence to the constitutional guarantees for the security of property and protection of the home against invasion.

III.

The Claimant Had the Inalienable Right to Prescribe for Himself in Any Manner He Saw Fit Without Governmental Interference.

It was Herbert Spencer who said:

> "Every man has the right to do whatever he wills, provided that in the doing thereof he infringes not the equal rights of any other man."

The Constitution was expressly intended to guarantee that right. The term "liberty" as prescribed by the Constitution is not to be cramped into meaning mere freedom from physical restraint but is deemed to express the right to the use and exercise of one's powers, one's

faculties and one's property in any manner he may see fit, and to enjoy those things in such a way as his inclination might suggest, if it be not evil in itself and in no way invades the rights of others.

The claimant's use of the machine in any way he may see fit, without coercion by the Government is his own prerogative, just as it is the right and prerogative of a Christian Scientist to attempt to effect a cure of his bodily ailments without medical interference.

The late Mr. Justice Brandeis, in championing the "right to be let alone" said:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment." (From dissenting opinion in the case of *Olmstead v. U. S.*, 277 U.S. 438, 478—66 A.L.R. 391).

The question here involved is not the merits of the spectro-chrome, or whether it is preferable to submit oneself to treatment by doctors practicing medicine and surgery, or by practitioners of Christian Science, or by the rays of a machine. The issue here is the sacred and fundamental right of an individual to follow whatever

practitioner or method of treating himself he pleases.

There are those who believe in the application of physio therapy as the only medium of treatment, such as therapy by x-ray, violet ray or infra red ray machines, and there are those who believe that the radiation of the colors disseminated by the spectro-chrome is more preferable. And, there are those who believe that conformity to the laws of nature or religious faith are to be preferred to medical and surgical treatment.

In olden days the magical words of the tribal medicine man, or the barbaric priest, were considered the most efficient methods of obtaining curative results. There are still in existence many people who believe in the curative effect of certain vegetables, fruits or herbs. The prayers of certain religious practitioners backed by the knowledge that God's plan provides a great healing power in ourselves, are considered far more efficient by some than the ministration of doctors.

The right of belief in any particular religion without molestation on account thereof is guaranteed to every one by the first amendment to the United States Constitution, which specifically enjoins Congress from making any law respecting the establishment of religion or prohibiting the free exercise thereof. Would it be contended that the followers of Mary Baker Eddy in the method of treating their ailments by religious faith could be forced to accept the treatment of medical practitioners?

It might be refreshing to recall the words of Thomas Jefferson, who wrote as follows:

> "The state has no jurisdiction over the conscience of the subject, nor the right to intervene between that conscience and his God. The care of every man's soul belongs to himself, but what if he neglected the care of it; what if he neglected the care of his health or estate, which more nearly relates to the state, *Will the magistrate make a law that he shall not be poor or sick?* The laws provide against injury from others, but not from ourselves. God himself will not save men against their wills." (Young Jefferson by Claude Bower).

The Government in one breath asserts "that it has no design to interfere with the right of an individual to select his own manner and means of treatment, (Appellant's brief, page 44), and yet it claims that under the police power of the Food, Drug and Cosmetic Act it had the right at any time and place to seize and condemn articles of contraband that had at some time been introduced in interstate commerce, because they are dangerous to health, and it even goes so far as to hold out the frightening suggestion that it would be suicidal for a person to follow the directions of the labelling that accompanied the machine.

The real and impelling cause for the extraordinary zeal of the Government in this instance, is found in this statement, "it seems clear therefore that the machine is recommended in its labelling as effective as a remedy or cure for a number of diseases which are universally recognized to be fatal unless subjected to proper *medical* or surgical treatment." (Apellant's brief, page 13).

It must be evident that the action of the Government is a misdirected, though well-meaning effort, spurred on by the Federal Security Agency under the

prodding of the American Medical Association to prevent the use of this type of machine or device for the treatment of human ailments and to coerce the users to secure medical treatment. In this connection it might be interesting to speculate whether the same zeal would be displayed were the machine an infra red lamp, or other of the numerous type of devices advocated by practitioners of physio therapy, and by many medical practitioners as well. Undoubtedly many claims therefor have been made that could likewise be proven false and misleading by the medical profession, but which nevertheless have produced the desired results.

As stated by Judge McColloch in his memorandum opinion filed in this case:

> "I know many people who wear charms, including some who carry the lowly potato to keep disease away, and I had always thought they had the right to do this. Incidentally I have no doubt that many get help in this manner." (Tr. p. 24)

Indeed, in the article appearing in the Time Magazine, May 20, 1946, Dr. Herman Vommer of New York, expressed his opinion supported by findings of French, German and Swiss dermatologists that "suggestion is at least twice as an effective cure for warts as X-rays or surgery", and proved it by charming away a face full of warts from the daughter of a skeptical dermatologist!

It was not so long ago that the medical profession charged, and many orthodox doctors still charge, that chiropractors and osteopaths were and are quacks and close their minds to the technics that these practitioners have developed, claiming that they were dangerous and

a menace to health, notwithstanding that thousands have been benefited by their treatment.

These tactics have been used against every non-medical person who has helped to advance the healing arts. Elizabeth Kenny, the nurse whose methods have revolutionized the treatment of polio, was the most recent target. The best answer was supplied by Oliver Wendell Holmes, who reminded the arrogant doctors that medicine learned "from a Jesuit how to cure agues, from a friar how to cut for the stone, from a soldier how to treat gout, from a sailor how to keep off scurvy, from a postmaster how to sound the Eustachian tube, from a dairymaid how to prevent small pox and from an old market woman how to catch the itch-insect." (Readers Digest, February, 1947, p. 106).

CONCLUSION

To summarize the salient point in the case.

The machine or device had long since ceased to be a subject of interstate shipment. It had found permanent lodgment in the home of the claimant. It was his own private property—bought and paid for. The machine was not inherently dangerous. In its construction it was not unlike thousands of other machines equipped with glass slides of different colors, radiating multi-colored lights. It was clearly not injurious per se. It certainly could not, of its own physical operation, produce any direct physical injury to anyone. It was, according to the Government's own contention a useless piece of metal.

Regardless of the fraudulent representations, if any, that accompanied the machine as to its efficacy as a treatment and cure for certain diseases, the claimant believed and had faith that it could benefit his ailments. Whether the machine could be given credit therefor, or whether it was due to faith, or the power of suggestion, or to nature's own reservoir of healing powers in one's body, the fact remains that he was benefited by its use.

Upon no justifiable theory can the Government claim the right to invade his private home and take his private property away from him when that private property is not in and of itself directly injurious to him or to anyone else, but the Government contends that it is indirectly injurious in that serious injury, prolonged illness or death might follow, if medical treatment were delayed due to the use of the machine. Such a contention invites the comment frequently expressed of "doctors' mistakes" and "errors in judgment", which too often are buried with the patient!

We resist the temptation to further explore the subject, but simply point out that medicine is not an exact science and that its practice is likewise not immune from the dangerous consequences that follow its failure to effect a cure of human ailments.

But if the Government is justified in its pursuit of this machine on the ground that it indirectly might cause injury to its users because of delay in securing appropriate medical treatment, then we submit that the Government could, with equal reason, claim the right to invade the home to seize, burn and destroy many

books, documents and papers that are daily the medium of traffic in interstate commerce, and which contain within their covers many false and misleading statements and theories, which undoubtedly produce indirect injuries to those individuals who believe and consequently conduct their lives in accord with those false misleading statements and theories.

We recall the many articles of Dr. Fletcher, who advocated the fad of chewing food to impalpability, which indirectly caused indigestion; the articles advocating fresh air schools which indirectly caused pneumonia; the articles advocating the cutting out of tonsils, adenoids and other vital organs; the articles advocating the use of certain vitamins, pills, nostrums and other home remedies and treatments which indirectly caused many injurious consequences to one's health and life. These examples can be multiplied by the score.

To present these illustrations is to refute the Government's contention, and to support the opinion of Judge McColloch that the injury must be direct and not indirect, and that in the face of this continued interference with and encroachment upon our Constitutional guarantees it is "time for the Federal Judges to dust off the Constitution."

Respectfully submitted,

BARNETT H. GOLDSTEIN,
Attorneys for Appellee.

No. 11404

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD C. COMMERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

JOHN W. MAHAN,
Helena, Montana, and

CHARLES E. PEW,
Helena, Montana,
Attorneys for Petitioner and Appellant.

JOHN B. TANSIL,
United States Attorney, Billings, Montana;

HARLOW PEASE,
Assistant United States Attorney, Butte, Montana, and

FRANCIS J. McGAN,
Attorney, Department of Justice, Butte, Montana,
Attorneys for Respondent and Appellee.

[1*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

In the District Court of the United States in and for the District of Montana, Helena Division

No. 276

EDWARD C. COMMERS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Be It Remembered that on March 26, 1946, the Amended Petition For Declaratory Judgment of the Petitioner Edward C. Commers was filed in the above-entitled cause in the words and figures following, to-wit: [2]

[Title of District Court and Cause.]

AMENDED PETITION FOR DECLARATORY JUDGMENT

Comes now the petitioner above named, and for himself and for all other persons similarly situated who shall join in this proceeding, and files this his amended petition, and respectfully shows:

I.

That petitioner is a native born citizen of the United States, and is a resident of the City of Helena, Montana, and has never been convicted of crime;

II.

That on December 7th, 1941, the Empire of Ja-

pan, a member of a coalition composed of Germany, Italy, and Japan, commonly referred to as the Axis, attacked the United States of America, respondent herein, at Pearl Harbor in the Hawaiian Islands in the Pacific; that immediately thereafter the United States declared war upon the members of the Axis, and ever since such declaration of war a state of war has existed and still exists between the United States of America and said Axis, said war being commonly known and referred to as World War II;

III.

That under the Selective Service Act of Congress of September 16, 1940, and amendatory and supplementary acts of Congress, the respondent drafted all of the manpower of the United States between the ages of seventeen and sixty-five years into the military service of the United States to defend [3] it, the said United States of America, respondent herein, against its said enemies in said war; that under said draft about fifteen million citizens of the United States were under said Selective Service Act and amendatory and supplementary acts of Congress, inducted into, or otherwise enrolled in, the armed forces of respondent and served in active duty in said armed forces in said war; that several million of such citizens were young men from seventeen to twenty-five; that the citizens so drafted as hereinabove set forth were taken from school, from positions, or from business, in every walk of life;

IV.

That on the 19th day of October, 1942, the respondent, acting through its War Department, and under said Selective Service Act and amendatory and supplementary acts, drafted or conscripted petitioners into said military service of respondent in said war, and that from said 19th day of October, 1942, until August 6th, 1945, upon which date petitioner was discharged from said military service, petitioner served on active duty in the army of the United States in said war, under the control and direction of the War Department of respondent;

V.

That petitioner received infantry training in said army at Camp Walters, in the State of Texas, and in June, 1943, was assigned to the Sixth Division of the United States Army, being an infantry division, and served with that division through all the campaigns hereinafter mentioned, and until his discharge on August 6th, 1945; that on or about the 20th day of September, 1943, said division was sent to Honolulu, where it remained until February 4th, 1944;

VI.

That on or about February 4th, 1944, said Division [4] embarked for New Guinea, landing at Milne Bay, proceeding thence to Toem, on Maffin Bay, New Guinea, relieving the 158th Regimental Combat Team under the command of General Hanford McNider, which Combat Team had

made a previous landing at and had occupied Toem;

VII.

That from the time of reaching Toem, on or about June 11, 1944, until August 23, 1944, said Division was in contact and combat continuously with the enemy, the jungle around Toem being full of Japs, and patrol fighting being practically continuous; that at Toem an enemy high-explosive shell exploded near petitioner, throwing him into a ditch and injuring his arm;

VIII.

That from Toem, in the latter part of August, 1944, said Sixth Division moved up to Sansapore, New Guinea, being under air attack en route, and at Sansapore was in constant contact with the enemy until the latter part of December, 1944, when said Division embarked in a large convoy for Linguayan Gulf, on the Island of Luzon;

IX.

That the 6th Division landed at Linguayan Gulf on January 9th, 1945, and fought its way down the Luzon Plains to the Shimbu Line, where the Japs had established themselves in control of the water supply of Manila; in this movement the First Cavalry Division covered our right flank; that we broke the Shimbu Line and took control of the water supply, and then chased Yamashita, commonly known as the Tiger of Malaya, and his men into the mountains north of Manila, where he later sur-

rendered; that on this campaign the 6th Division was in constant contact and combat with the enemy for one hundred and twelve days without relief and practically without removing their clothes; [5]

X.

That in February, 1945, at Markina Watershed, on Luzon, petitioner was injured in the right hand by a mortar burst; that about March 4, 1945, at Bayanbayanan, petitioner was injured in the back and legs by an artillery burst, nineteen pieces of metal being later removed from his body; that about April 5th, 1945, petitioner was showered with splinters of metal from a rocket bomb at Novaliches, receiving a severe concussion and being again injured in the back and legs by the impact and penetration of pieces of metal;

XI.

That on April 10, 1945, petitioner, who was then suffering from varicose veins in his legs, was flown from Manila to the hospital at Leyte as a litter case for surgical care and treatment for such varicose veins and to relieve constriction of the muscles of the leg, he being no longer able to perform duty in the field;

XII.

That petitioner was during his service awarded two silver stars, one individual bronze star, three purple hearts, and a good conduct medal;

XIII.

That petitioner, as well as most of his outfit,

while in such service, suffered from dysentery, malaria, tropical rot, and other diseases and tropical maladies coming from the foul and poisonous conditions under which they served continuously from February 4th, 1944, until after April 10, 1945; and from the effects of the drugs fed to the men daily as an antidote for the poisonous conditions; that petitioner has constantly recurring attacks of malaria, or seizures comparable to malaria, and is likely to require hospitalization from time to time; [6]

XIV.

That because of said injuries and sickness and the resulting disabilities petitioner has been since prior to his discharge from the army and still is totally unable to follow any substantial gainful occupation at manual work, continuously or at all; that prior to his induction he made his living at manual work; that prior to his induction petitioner engaged habitually in athletics and athletic sports, but is now unable to do so; that it is reasonably certain that said disabilities will continue in a totally disabling degree throughout the life of petitioner;

XV.

That by reason of the foregoing, petitioner has been damaged beyond the power of respondent to restore; but that he has been damaged financially to the extent of the cost of a comfortable livelihood, comparable to that enjoyed by the average citizen in comfortable financial circumstances; the cost of all necessary or beneficial hospitalization,

and the cost of such education or vocational training as will enable petitioner to receive as much enjoyment out of his remaining life as is reasonably possible;

XVI.

That the respondent has paid no part of said damage and injury to petitioner, but refuses to recognize any obligation to petitioner or to the others of the two or three million men disabled in this war, and denies any right in petitioner to compensation for his loss of ability to carry on as above set forth; that the only recognition the respondent has given to the plight of these men, including petitioner, is to establish an eleemosynary institution, styled the Veterans Administration, which dispenses to a few of said disabled men petty amounts as gratuities, or charity, and provides hospitalization in certain cases if the veteran will [7] sign a pauper affidavit; that petitioner, although totally disabled, receives in the form of such charitable contributions from said Veterans Administration the sum of Thirty-four and 50/100 Dollars per month while out of the hospital, not more than 25% of the amount necessary to maintain a citizen of the United States in decent comfort consistent with current living costs and standards; that while in hospital he receives the sum of Twenty Dollars per month; that immediately prior to his induction petitioner was capable of earning, and was earning and receiving for his services, at manual work, the sum of at least $200.00 per month;

XVII.

That the respondent is amply able to pay that which is due petitioner and the two or three million other disabled men and women of this war, and the dependents of those who died in defense of this country; that the people of the United States made in said war at least three hundred billion dollars of profit; that under its taxing power, expanded by the emergency, and available until its obligation to the lives that were wrecked by war service is provided for, respondent has ample means of raising the necessary money with which to recompense, as far as money may do, the men and women who have been disabled in its military service in the war against the Axis Powers;

XVIII.

That the body of petitioner was taken by respondent by virtue of said acts of Congress, and acting through its War Department and the officers and agents thereof, for a public use, to-wit, the defense of the United States against its enemies, and was used by said respondent for such purpose, and as the direct result of such use the body of petitioner has been injured and damaged and his earning power destroyed as herein set forth; [8]

XIX.

That on the 4th day of July, 1776, the Thirteen American Colonies, styling themselves the Thirteen United States of America, adopted a Declaration of Independence, declaring,

"We hold these truths to be self-evident—

> that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness;"

that the Revolutionary War was fought upon this premise, and upon its conclusion the people of the colonies became free men, and the owners of their own bodies and captains of their own political destinies;

XX.

That in the year 1787, a constitutional convention was held at Philadelphia, Pennsylvania, at which convention representatives from the colonies, after three months or more of deliberation, adopted a constitution, the preamble to which recites, among other things:

> "We the people of the United States, in order to * * * establish justice * * * and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America;"

XXI.

That thereafter, in the year 1789, the states, consistently with the provisions of said constitution, ratified a series of amendments to said constitution, among which is the Fifth Amendment, which provides, among other things, that "No person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation;" also the Seventh Amendment, which pro-

vides that in common law action involving more than $20.00 the right to trial by jury shall be preserved;

XXII.

That thereafter, between February 1, 1861, and December [9] 18, 1865, the Thirteenth Amendment to said constitution was ratified by the necessary majority of the states, the first section of said amendment reading as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

XVIII.

That under the pronouncement contained in said Declaration of Independence, and under said constitution and the amendments thereto above set forth or referred to, the body of petitioner is his own, and the earning power of his body is his property, and not the property of the United States or of any other group of its citizens; that under the institutions of liberty established by the Constitution each citizen has equal right to life, liberty and the pursuit of happiness, and each citizen has an equal share in the sovereignty of the United States; that when in the course of human events a part of such citizens are required by law to sacrifice their liberty, the pursuit of happiness, and the integrity of their bodies, in the common defense, they do not thereby become the slaves, serfs, or chattels of those who do not fight; to be sacrificed

without obligation; but under the compact under which we live, those disabled in the common defense are entitled, not only as a matter of natural right, as between sovereigns, but by the express terms of the Fifth Amendment to said constitution, to be restored as near as may be to a dignified and honorable status among the sovereign people of this democracy, and to just compensation; and they also have the right, as a corollary to the main proposition, to the due process of law and the jury trial in establishing that obligation, guaranteed by said constitution and its amendments;

XXIV.

That just compensation for such use means adequate [10] compensation for physical impairment, and consequent loss of earning power, and education, training, and necessary hospitalization, which will enable petitioner to enjoy a comfortable living comparable to that enjoyed by the average citizen in comfortable circumstances;

XXV.

That all laws of Congress now in force are based upon the theory that those who fight are the slaves, serfs, or chattels of those who do not fight, and that the bodies of those who fight, and their earning power, may be sacrificed in the common defense without legal obligation of any kind, and that whatever is paid to or on account of our war disabled is "gratuity" or common charity, all of which is contrary to every principle of our constitution and

all principles of free government; that charity does not pay legal debts; that petitioner does not desire charity, but asks only what is due him under the constitution and as a matter of natural right;

XXVI.

That the earning power of man is property; that the earning power of man enters into every kind of property which is prepared for human use or consumption; that every article of merchandise contains, as its principle ingredient, the labor, the inventions, and the ingenuity of man; that every item of processed material used in war is essentially the product of the earning power of man; that the earning power of man is bought and sold on a tremendous scale every day; that the sale of a battleship, of an airplane, of a tank, or of any other paraphernalia of war, is a sale of the earning power of man:

XXVII.

That the expenditure of the bodily integrity of man and of his earning power in battle or in any other type of military service in time of war is the taking of private property for a public use, for which the respondent is required to make [11] just compensation under the Fifth Amendment to the Constitution, the same as for earning power in the form of ships, planes, guns, or other processed articles of merchandise or materiel of war;

XXVIII.

That the provisions of the Economy Act of

March 20, 1933, styled "An Act to Maintain the Credit of the United States Government," being Sections ..... et seq., of Title ....., U.S.C., is unconstitutional and violative of the provisions of the Fifth and Seventh Amendments to the Constitution of the United States, in that it deprives all disabled veterans of the wars of the United States of due process of law and a jury trial in the prosecution of their claims against the United States for impairment of bodily integrity and impairment of earning power;

XXIX.

That the constitutional provisions herein referred to are necessarily available to the citizen affected thereby without Congressional sanction; and are enforceable by the Courts of the United States; and that non-action or adverse action by Congress cannot nullify the constitution and deprive the citizen of the benefit of such constitutional provisions;

XXX.

That no consent to be sued, other than the consent implied from the Fifth Amendment, is necessary to entitle petitioner to maintain this action; that moreover, this is not an action for a specific recovery against the respondent, but is a proceeding for a judgment of this Court construing the constitutional provisions herein referred to; that this Court is a Court of general jurisdiction in all matters arising under the constitution or laws of the United States, and has jurisdiction to entertain this action; [12]

XXXI.

That unless this Honorable Court take jurisdiction and grant petitioner the relief prayed for, he will be denied the benefit of the constitutional provisions herein referred to.

Wherefore, petitioner prays that this Honorable Court exercise its legal and equitable jurisdiction and enter a declaratory judgment herein, construing the said constitution and the 5th and 7th and 13th Amendments thereto, adjudging:

1. That under said Fifth Amendment the taking of the body and the earning power of petitioner for use in the military forces of respondent in said World War II was a taking of private property for a public use;

2. That the respondent is obligated not only under said Fifth Amendment, but as a matter of natural right, to make just compensation to petitioner and all other veterans, respectively, disabled in said war;

3. That petitioner and all other such war veterans are entitled, as a matter of constitutional right, to try their claims for bodily impairment in the district courts of the United States, and to have the jury trial guaranteed by said Seventh Amendment; and to pursue all remedies in the Courts of the United States applicable to actions at law or in equity;

4. That the United States has consented to be sued upon the claims of its war disabled, particularly those of World War II; that such consent

is implied from said Fifth Amendment, but that such consent is not necessary in an action for contribution;

5. That the provisions of the Economy Act of March 20, 1933, be adjudged to be unconstitutional and void;

6. For such other and further relief as to this Honorable Court shall be deemed meet or proper in the premises.

/s/ JOHN W. MAHAN,
/s/ C. E. PEW,
Attorneys for Petitioner.

In making reference to the foregoing petition to the decorations awarded to petitioner, I overcame his feeling of modesty, as I felt that the story would not be complete otherwise. I append this statement to save him embarrassment.

C. E. PEW,
Of Counsel.

Service of the foregoing amended petition and receipt of two copies thereof admitted this 23rd day of March, 1946.

JOHN B. TANSIL,
U. S. Atty.

HARLOW PEASE,
Ass't. U. S. Atty., Attys. for Respondent.

FRANCIS J. McGAN,
Atty., Dep't. of Justice.

[Endorsed]: Filed March 26, 1946. [13]

That on April 19, 1946, the Respondent, The United States of America, filed its Motion To Dismiss herein in the words and figures following, to-wit: [14]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the respondent above named and moves this Honorable Court for an order dismissing this cause on the grounds and for the reasons:

I.

That the amended petition for declaratory judgment fails to state a claim against this respondent upon which relief can be granted.

II.

That this Court is without jurisdiction to hear and determine this cause for the reason that the United States cannot be sued without its consent and such consent has not been given in this case.

Dated this 19th day of April, 1946.

JOHN B. TANSIL,
United States Attorney.

/s/ HARLOW PEASE,
Assistant United States Attorney.

/s/ FRANCIS J. McGAN,
Attorney, Department of Justice, Attorneys for Respondent.

(Affidavits of Service attached.)

[Endorsed]: Filed Apr. 19, 1946. [15]

That on July 25, 1946, the Opinion of the District Court was filed herein in the words and figures following, to-wit: [16]

[Title of District Court and Cause.]

OPINION

Petitioner filed his amended petition for a declaratory judgment, alleging that he is a native born citizen of the United States and a resident of Helena, Montana; that the United States, acting under the Selective Training and Service Act of 1940, drafted him into the military service of the country on the 19th day of October, 1942; that he remained in such service until the 6th day of August, 1945; that upon being selected he took his basic training in infantry in the United States; that he was thereafter assigned to the Sixth Division of the United States Army; that with that Division he was sent to the Pacific theater of war on the 20th day of September, 1943, and took part in several major engagements against the Japanese Army while in that theater of operation; that while so fighting he was wounded in combat action and as a result he is totally unable to follow any substantially gainful occupation at manual work, continuously or at all; that prior to his induction into the Army he was earning $200.00 a month and is now receiving from the Veterans Administration of the United States the sum of $34.50 a month for his disabilities. He alleges his taking into the Army by the United States constituted slavery and

involuntary servitude condemned by the Thirteenth Amendment to the Constitution; that his body was [17] his private property and could not be taken without just compensation under the Fifth Amendment to the Constitution, and that he has a right to maintain the action against the United States without specific consent on its part to be sued other than the consent implied from the Fifth Amendment to the Constitution. He prays for a declaratory judgment of the Court, construing the Fifth, Seventh and Thirteenth Amendments to the Constitution, and declaring that his induction into the Army constituted a taking of his body, and its earning power, his private property, for public use and for which he was entitled to just compensation under the Fifth Amendment; that he has a right to a trial by jury in this court for a determination of the compensation to be paid him.

The respondent has filed a motion to dismiss on the grounds (1) that the amended petition fails to state a claim upon which relief can be granted, and (2) the Court is without jurisdiction to hear and determine this cause for that the United States cannot be sued without its consent and that such consent has not been given.

Extensive oral argument was had before the Court by counsel for the respective parties and a voluminous brief filed. The theory of the petitioner seems to be set out in the following paragraphs of his complaint, which read:

"XV.

That by reason of the foregoing, petitioner has been damaged beyond the power of respondent to restore; but that he has been damaged financially to the extent of the cost of a comfortable livelihood, comparable to that enjoyed by the average citizen in comfortable financial circumstances; the cost of all necessary or beneficial hospitalization, and the cost of such education or vocational training as will enable petitioner to receive as much enjoyment out of his remaining life as is reasonably possible; [18]

"XVIII.

That the body of petitioner was taken by respondent by virtue of said acts of Congress, and acting through its War Department and the officers and agents thereof, for a public use, to-wit: the defense of the United States against its enemies, and was used by said respondent for such purpose, and as the direct result of such use the body of petitioner has been injured and damaged and his earning power destroyed as herein set forth;

"XXIII.

That under the pronouncement contained in said Declaration of Independence, and under said constitution and the amendments thereto above set forth or referred to, the body of petitioner is his own, and the earning power of his body is his property, and not the property of the United States or of any other group of its citizens; that under the institutions of liberty established by the Consti-

tution each citizen has equal right to life, liberty and the pursuit of happiness, and each citizen has an equal share in the sovereignty of the United States; that when in the course of human events a part of such citizens are required by law to sacrifice their liberty, the pursuit of happiness, and the integrity of their bodies, in the common defense, they do not thereby become the slaves, serfs, or chattels of those who do not fight; to be sacrificed without obligation; but under the compact under which we live, those disabled in the common defense are entitled, not only as a matter of natural right, as between sovereigns, but by the express terms of the Fifth Amendment to said constitution, to be restored as near as may be to a dignified and honorable status among the sovereign people of this democracy, and to just compensation; and they also have the right, as a corollary to the main proposition, to the due process of law and the jury trial in establishing that obligation, guaranteed by said constitution and its amendments; [19]

"XXVII

That the expenditure of the bodily integrity of man and of his earning power in battle or in any other type of military service in time of war is the taking of private property for a public use, for which the respondent is required to make just compensation under the Fifth Amendment to the Constitution, the same as for earning power in the form of ships, planes, guns, or other processed articles of merchandise, or material of war;

"XXX

That no consent to be sued, other than the consent implied from the Fifth Amendment, is necessary to entitle petitioner to maintain this action; that moreover, this is not an action for a specific recovery against the respondent, but is a proceeding for a judgment of this Court construing the constitutional provisions herein referred to; that this Court is a Court of general jurisdiction in all matters arising under the constitution or laws of the United States, and has jurisdiction to entertain this action."

The petitioner apparently bases his right to maintain this action upon the theory that his body is private property; that it is owned by him and such being true it falls within the perview of that portion of the Fifth Amendment to the Constitution which provides: "Nor shall private property be taken for public use without just compensation." Counsel for petitioner have cited no authority holding that since the adoption of the Thirteenth Amendment to the Constitution the body of a human being within the United States is that character of private property referred to in the Constitutional Amendment, or is subject to private ownership. The argument advanced, that the body of the petitioner is private property owned by him which could not be taken for public use without just compensation, is pregnant with the admission that his body owned [20] by him is private property which could be taken for public use upon the payment of

just compensation. The taking of the character of private property contemplated by the Fifth Amendment for public use upon the payment of compensation is a taking not limited to times of war, but the right may be exercised equally as lawfully under the Constitution by the United States in times of peace, and to assert that one's body is private property that may be taken by the United States for any governmental purpose of any kind upon the payment of just compensation is to contend for something so far contrary to our theory of government, the relationship of the government and citizens as to be untenable.

In adopting the Constitution the people authorized the Congress to raise and support armies. Article 1, Section 8, Clause 12. This was not only an authorization to Congress, it was also a mandate to Congress to raise and support armies whenever the nation was in peril and under attack by a foreign power, and in enacting the Selective Training and Service Act of 1940 (Title 50 Appendix, U.S.C.A., Section 301 et. seq.) the Congress but carried out the constitutional authority granted it. Selective Draft Law Cases, 245 U. S. 366. The power to raise and support armies, granted to the Congress by the Constitution, is neither limited nor conditioned by the Section. It is an unrestricted grant of power unless, as contended by petitioner, the Fifth Amendment to the Constitution conditions the power of Congress to raise and support armies upon payment of just compensation to those inducted into the army. If, as contended by peti-

tioner, his body and its earning power in civilian pursuits is his own private property which cannot be taken without just compensation for a public use, then the taking of his body was not at the time he was injured, but at the time he was inducted into the army. It was at that time that he was prevented from capitalizing on its actual earning power in civilian pursuits and it was at that time that the right to just compensation [21] arose. If the United States paid the petitioner less than $200.00 a month when he was first taken into the army, he was then earning less than he was when his body was taken, and under his theory just compensation would be the difference between what he was then being paid by the government and what he had been earning when he was taken. The fact that he was wounded and the earning power of his body permanently impaired operates only to entitle him to further compensation for a permanent impairment after his discharge, whereas had he been discharged unwounded and in good bodily health, the payment of just compensation by the government during the time he was in the army and up to and including his charge would have absolved the government from further obligation. Thus if petitioner's theory is correct, it would appear that in raising an army the United States immediately was under an obligation to pay to every man inducted into the armed forces under the Selective Training and Service Act just compensation for the taking of the body and its earning power and was under a like obligation to pay just compensation to each

conscientious objector, who was assigned to and compelled to do work of a national importance under the Selective Training and Service Act, because of the taking of his body and its earning power, and each of them immediately became vested with a cause of action against the United States properly triable in this court and before a jury to have the amount of that just compensation fixed.

An examination of the authorities discloses that the contention made here has been uniformly rejected by every court before whom it has been raised. In Jacobson v. Massachusetts, 197 U. S. 11, at page 29, the Supreme Court said: "The liberty secured by the Fourteenth Amendment, this Court has said, consists, in part, in the right of a person 'to live and work where he will', Allgeyer v. Louisiana, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, [22] or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." (Emphasis supplied).

In United States v. MacIntosh, 283 U. S. 605 at 620, the Supreme Court said: "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution. The common defense was one of the purposes for which the people ordained and established the Constitution * * *. We need not refer to the numerous statutes that contemplate defense of the United

States, its Constitution and laws by armed citizens". At page 622 the Court continues: "The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to 'provide for the common defense'. In express terms Congress is empowered 'to declare war', which necessarily connotes the plenary power to wage war with all of the force necessary to make it effective; and 'to raise * * * armies', which necessarily connotes the like power to say who shall serve in them and in what way. From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifcation or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams 'this power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life'. To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the Army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that

term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war. These are but illustrations of the breadth of power." This language is not departed from by the Supreme Court in Girouard v. United States, ... U. S. ....., decided April 22, 1946.

"It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force." Selective Draft Law Cases, supra, at 378.

"Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives the appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime, also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection." Hopper v. United States, 142 Fed. (2d) 181 at 186 (C.C.A. 9). Tatum v. United States, 146 Fed. (2d) 406 (C.C.A. 9).

Local Draft Board No. 1 of Silver Bow County, Montana v. Conners, 124 Fed. (2d) 388 (C.C.A. 9).

"In view of the breadth of the war power as indicated by the above cases and the cases cited therein, we have no doubt that the system devised for the treatment of persons who by reason of religious training and belief are conscientiously opposed to participation in war in any form does not deprive them of any of their constitutional rights even though, in practical effect, it deprives them of their full liberty and requires them to work at a rate of compensation far below that which could be earned in civilian life and even below what could be earned in the armed forces." Weightman v. United States, 142 Fed. (2d) 188 at 191.

From the foregoing authorities it is apparent that the contention made that the power granted Congress by Article 1, Section 8, Clause 12, to raise and support armies is conditioned or dependent upon the payment of just compensation to those taken into the armed forces, and that such taking constitutes a taking of private property without just compensation, as condemned by the Fifth Amendment to the Constitution, is without merit.

Petitioner next contends that in being taken into the army, as he was taken, he became a slave or serf and was subjected to involuntary servitude in violation of the Thirteenth Amendment to the Constitution.

On the face of it, it is difficult to understand how it can be asserted by a free man, that while fight-

ing to protect his own freedom and to defend and support the Constitution and the form of government that guarantees him the continuance of that freedom and prevents his enslavement, he is then a slave or serf. Upon examination of the authorities it appears that this contention is equally without merit. "Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme [25] and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." Selective Draft Law Cases, supra, at 390. Hopper v. United States, supra.

"The answer to appellant's complaint lies in the broad principle that the Thirteenth Amendment has no application to a call for service made by one's government according to law to meet a public need, just as a call for money in such a case is taxation and not confiscation of property * * *. During the first World War convictions for refusing army service were attacked as violations of this amendment. The contention was overruled without being dignified by being argued * * *. The present war is described by its authors as 'total war', meaning that every means of destruction will be used, and men, women and children alike killed. It means

also that total effort may be necessary to resist it, men, women and children all doing what they can. Such a total call has not yet been made by the United States, but is within its power under those parts of the Constitution which authorize Congress to declare war and raise and equip armies. There can be no doubt whatever that Congress has the constitutional power to require appellant, an able-bodied man, to serve in the army, or in lieu of such service to perform other work of national importance. The Thirteenth Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need." Heflin v. Sanford, 142 Fed. (2d) 798 (C.C.A. 5).

"The right of Congress to impose upon our citizenry the burden of serving in the armed forces is not questioned. The Supreme Court * * * makes clear the power of Congress to enlist the manpower of the nation for the prosecution of war and to subject to military service both the willing and unwilling." Tatum v. United States, 146 Fed. (2d) 406 (C.C.A. 9).

In view of the unbroken line of decisions of the Supreme Court and of the Circuit Courts of Appeal from the inception of our government, it does not appear how, at this date, it could be earnestly contended that consent on the part of the United States to be sued is not necessary to the maintenance of this action. In Lynch v. United States, 292

U. S. 571, the Supreme Court said: "The rule that the United States may not be sued without its consent is all embracing * * *. The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, DeGroot v. United States, 5 Wall. 419, 431; United States v. Babcock, 250 U. S. 328, 331; and to those arising from some violation of rights conferred upon the citizen by the Constitution, Schillinger v. United States, 155 U. S. 163, 166, 168."

"The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government." Schillinger v. United States, 155 U. S. 163 at 166. [27]

The contention made that aside from any act of Congress this Court has jurisdiction of the action because of the provisions of the Fifth Amendment to the Constitution is equally untenable.

It is too well settled to be the subject of argument that the Federal District Courts have only such jurisdiction as the Congress may give them. "All Federal Courts, other than the Supreme Court,

derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, Section 1 of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe * * *. The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to the Congress may seem proper for the public good'." Lockerty v. Phillips, 319 U. S. 182 at 187.

It is equally well recognized that Congress may create rights in individuals against the United States and establish special tribunals, aside from the courts, to administer and enforce the rights created. Congress is not required to provide that the enforcement of those rights in a contest between the individual and the United States be through the courts, although it may well have done so. "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. United States v. Babcock, 250 U. S. 328, 331. It may limit the individual to administrative remedies. Tutun v. United States, 270 U. S. 568, 576." Lynch v. United States, supra, at 582. c.f. Silberschein [28] v. United States, 266 U. S. 221.

Congress has created rights against the United States insofar as the plaintiff in the action is concerned, in the enactment of the World War Veterans Act of 1924, 38 U.S.C.A., 421 et. seq., and similar legislation. It provided also for the administration and enforcement of these rights by the Administrator of Veterans Affairs. It thus created a special tribunal to administer, execute and enforce its legislation as it had the constitutional power to do. The argument that Section 426 of Title 38, U.S.C.A. and Section 705 of Title 38, U.S.C.A., giving to the Administrator the power to decide all questions arising, making his decisions on questions of fact conclusive and providing that no court of the United States shall have jurisdiction to review such decisions, is an unconstitutional exercise of the power of Congress is without merit. It is but an exercise of its constitutional power to give or withhold from the District Courts such jurisdiction as it sees fit. If, as contended, Congress was unwise in so providing in this instance, the only relief to plaintiff is by Congressional action and not by an appeal to the courts.

Congress has frequently exercised its right to establish special tribunals for the enforcement of rights against the United States, containing like provisions as to the finality of the findings of the tribunals as to questions of fact and Congress has uniformly been sustained, as for illustration Section 310 of Title 50, Appendix, U.S.C.A. with reference to the decisions of the local draft boards, Local Draft Board No. 1 of Silver Bow County, Montana,

v. Connors, supra; the Emergency Price Control Act of 1942 establishing the Emergency Court of Appeals and withholding from the lower Federal Courts jurisdiction to pass upon the questions passed upon by that Court and [29] making its decisions reviewable only by the Supreme Court. Yakus v. United States, 321 U. S. 414. Many other illustrations could be cited.

From the foregoing it necessarily follows that no actual controversy of a justifiable nature does or can exist and the motion made by the respondent to dismiss the action should be and hereby is sustained upon each of the grounds set forth in the motion and the action is ordered dismissed.

The petitioner is granted an exception to the ruling of the Court.

R. LEWIS BROWN,
United States District Judge.

[Endorsed]: Filed July 25, 1946. [30]

That on July 30, 1946, Judgment was entered herein in the words and figures following, to-wit:

In the District Court of the United States
for the District of Montana
Helena Division

No. 276

EDWARD C. COMMERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

This cause came on regularly for hearing before this Court, Honorable R. Lewis Brown, Judge, presiding, on the defendant's motion that the same be dismissed. After considering the argument of counsel and briefs of the parties, the Court filed its opinion sustaining said motion.

Wherefore, it is hereby Ordered, Adjudged and Decreed that this action be and the same is hereby dismissed.

Dated at Butte, Montana, this 29th day of July, 1946.

/s/ R. LEWIS BROWN,
Judge.

Entered July 30, 1946. H. H. Walker, Clerk.

[Endorsed]: Filed July 29, 1946 [32]

That on July 30, 1946, an Order directing Clerk to correct typographical error in said Judgment was made and entered in the minutes of said District Court in the words and figures following, to-wit:

[Title of District Court and Cause.]

It appearing to the Court that in the judgment heretofore signed in this cause by the court on the 29th day of July, 1946, it is recited therein that the cause came on for hearing on the plaintiff's motion that the same be dismissed; the fact is the cause came on for hearing on the defendant's motion that the same be dismissed and the recital in the judgment otherwise is a typographical error inserted through inadvertance and mistake and on application of Francis J. McGan, one of the counsel for the respondent, said judgment is ordered amended and corrected to state the truth in the recital thereof by the striking therefrom of the word "plaintiff's", the second word in the third line of the judgment, and inserting in lieu thereof the word "defendant's", and said correction to be made by the Clerk of this court.

Entered in open Court at Butte, Montana, July 30, 1946.

H. H. WALKER,
Clerk. [34]

That on August 1, 1946, the said Petitioner filed herein his Notice of Appeal in the words and figures following, to-wit:

[Title of District Court and Cause.]

NOTICE OF APPEAL.

To the above named Respondent, and to The Honorable John B. Tansil, United States Attorney, and the Honorable Francis J. McGan, Attorney, Department of Justice, Attorneys for said Respondent:

You and each of you will please take notice that the above named petitioner hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, from the final judgment given, made, rendered and entered in the above entitled District Court, on the 29th day of July, 1946, as amended and corrected by order of said District Court dated and entered July 30, 1946, dismissing the above entitled cause; and petitioner appeals from the whole of said judgment.

Dated August 1st, 1946.

JOHN W. MAHAN,

C. E. PEW,

Attorneys for Petitioner, and Appellant.

[Endorsed]: Filed Aug. 1, 1946. [36]

That on August 1, 1946, the said Petitioner filed herein his Bond for Costs On Appeal in the words and figures following, to-wit: [37]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL.

Know All Men by These Presents: That Edward C. Commers, as principal, and Cora Read Pew and John J. Tomcheck, as sureties, hereby acknowledge themselves jointly and severally firmly bound unto the above named Respondent, the United States of America, in the sum of Two Hundred and Fifty Dollars ($250.00), lawful money of the United States, for the payment of which, well and truly to be made, we and each of us, respectively, bind ourselves and our and each of our heirs, executors and administrators, jointly and severally as aforesaid, firmly by these presents.

Sealed with our seals and dated this 1st day of August, 1946.

The condition of the above obligation is such that whereas, the petitioner is appealing to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of the above entitled District Court entered in the above entitled cause on July 29th, 1946, as amended and corrected by order of said Court dated July 30, 1946, dismissing the above entitled cause;

Now, Therefore, if the plaintiff shall pay the costs of appeal if the appeal is dismissed or said judgment affirmed, [38] or such costs as said Appellate Court may award if said judgment is modified, then this

obligation to be void; otherwise to remain in full force and effect.

[Seal] EDWARD C. COMMERS,
[Seal] CORA READ PEW,
[Seal] JOHN J. TOMCHECK.

State of Montana,
County of Lewis and Clark—ss.

Cora Read Pew and John J. Tomcheck, the sureties named in the foregoing bond, being first duly sworn, each for himself and herself, says: I am a resident and freeholder and householder within the County of Lewis and Clark, State of Montana, and am worth double the amount of the within bond, over and above all my just debts and liabilities, and not including property exempt from execution.

CORA READ PEW,
JOHN J. TOMCHECK.

Subscribed and sworn to before me this 1st day of August, 1946.

[Seal] JOHN W. CHAPMAN,
Notary Public for the state of Montana, residing at Helena, Montana. My commission expires June 7, 1949.

[Endorsed]: Filed Aug. 1, 1946. [39]

That on August 3, 1946, the parties filed herein their Stipulation designating the parts of the record and proceedings to be included in the record on appeal in words and figures following, to-wit: [40]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed, by and between the parties to the above entitled cause, through their respective attorneys, that the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, under the appeal now being prosecuted by the above named petitioner, shall embody copies of all of the pleadings and other papers filed herein, other than the original petition; such record to embody copies of the amended petition, the motion of respondent to dismiss, the opinion of the Court, the judgment entered on July 29, 1946, the order amending and correcting said judgment, entered on July 30, 1946, the notice of appeal, the bond for costs on appeal, and this stipulation.

Dated at Butte, Montana, this 2nd day of August, 1946.

JOHN B. TANSIL,
United States Attorney,
District of Montana.

HARLOW PEASE,
Assistant United States Attorney, District of Montana.

FRANCIS J. McGAN,
Attorney, Department of Justice, Attorneys for Respondent.

JOHN W. MAHAN,
C. E. PEW,
Attorneys for Petitioner.

[Endorsed]: Filed Aug. 3, 1946. [41]

In the District Court of the United States in and for the District of Montana, Helena Division

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 41 pages numbered consecutively from 1 to 41 is a full, true and correct transcript of the record on appeal as designated by the stipulation of the parties and by rule, in case No. 276, Edward C. Commers, Petitioner, v. The United States of America, Respondent.

I further certify that the costs of said transcript amount to the sum of Nine and 10/100 dollars ($9.10), and have been paid by the appellant.

Witness my hand and the seal of said District Court this 5th day of August, 1946.

[Seal] H. H. WALKER,
Clerk. [42]

[Endorsed]: No. 11404. United States Circuit Court of Appeals for the Ninth Circuit. Edward C. Commers, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed Aug. 14, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11404

EDWARD C. COMMERS,
Petitioner and Appellant,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee.

POINTS RELIED UPON BY APPELLANT AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.

To the Clerk of said Circuit Court of Appeals, San Francisco, California.

Sir:

The Appellant hereby states the points upon which he intends to rely in this appeal, and designates the parts of the record he thinks necessary for the consideration of said points, as follows:

POINTS TO BE RELIED UPON BY APPELLANT:

1. That the petitioner and appellant, who is and was at all times mentioned in the amended petition, a citizen and resident of the United States and of the State of Montana, and was never convicted of crime, was conscripted, under the Selective Service Act of the Congress of the United States, into the armed forces of the United States in the war be-

tween the United States and the Axis Powers following December 7, 1941;

2. That he served in the infantry in said war, under the War Department, fighting against the enemies of the United States, and in said service, in line of duty, he received wounds and injuries, and in said service contracted disease, from all of which his earning power was greatly impaired and he became totally disabled;

3. That the bodily integrity and earning power of man are property of the highest grade, and are the private property of the person who possesses them;

4. That petitioner's body was taken for a public use, and his bodily integrity and earning power were consumed in a public use;

5. That under the United States Constitution, and particularly under the Fifth Amendment thereof, the United States owes petitioner the obligation to justly compensate him for his impaired bodily integrity and lost earning power;

6. That Respondent denies any obligation to its war disabled, including petitioner, but makes some provision for small gifts, or charity;

7. That the Court has jurisdiction of this action under the provision of Section 400, Title 28, U.S.C.;

8. That this Court has jurisdiction of actions against the United States for just compensation for the impairment of bodily integrity and of

earning power to the men who have become disabled in war service;

9. That no consent of Congress is necessary to suit upon the obligation of the Respondent to its war disabled.

DESIGNATION OF PARTS OF RECORD APPELLANT THINKS NECESSARY FOR THE CONSIDERATION OF THE FOREGOING POINTS:

The entire record as filed in the above entitled Court by the Clerk of the District Court.

Dated August 5th, 1946.

/s/ JOHN W. MAHAN,
C. E. PEW,
Attorneys for Appellant.

(Acknowledgment of Service.)

Endorsed]: Filed August 14, 1946.

PAUL P. O'BRIEN,
Clerk.

NO. 11404

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD C. COMMERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Montana

JOHN W. MAHAN,
Helena, Montana, and

CHARLES E. PEW,
Helena, Montana,
Attorneys for Petitioner and Appellant

JOHN B. TANSIL,
United States Attorney, Billings, Montana;

HARLOW PEASE,
Assistant United States Attorney, Butte, Montana;

FRANCIS J. McGAN,
Attorney, Department of Justice, Butte, Montana,
Attorneys for Respondent and Appellee.

SUBJECT INDEX

STATUTES CITED

AUTHORITIES CITED

NO. 11404

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD C. COMMERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Montana

JOHN W. MAHAN,
Helena, Montana, and

CHARLES E. PEW,
Helena, Montana,
Attorneys for Petitioner and Appellant

JOHN B. TANSIL,
United States Attorney, Billings, Montana;

HARLOW PEASE,
Assistant United States Attorney, Butte, Montana;

FRANCIS J. McGAN,
Attorney, Department of Justice, Butte, Montana,
Attorneys for Respondent and Appellee.

STATEMENT OF FACTS

This is an action brought by Appellant for a declaratory judgment construing the Constitution of the United States and certain of its amendments, and declaring the rights of Appellant and others similarly situated. The petition alleges:

The citizenship of petitioner, the inception of World War II, the enactment of Selective Service Acts by Congress, the drafting of about fifteen million of our young men for military service;

Pars. I to III, Tr. pp. 2, 3

The drafting of petitioner on October 19, 1942, and his service on active duty in the military forces of Respondent until his discharge on August 6, 1945 (Par. IV, Tr. p. 4); the details of his service (Par. V to XII, Tr. pp. 4-6); injuries received and sickness incurred in line of duty (Par. X to XIII, Tr. pp. 6, 7);

The total disability of petitioner is alleged (Par. XIV and XV, Tr. pp. 7, 8); that respondent has paid no part of said damage and refuses to recognize any obligation to petitioner or to the others of the two or three million men disabled in said war and denies any right of petitioner to compensation for his loss of ability to carry on, making only some charitable payments;

Par. XVI, Tr. p. 8

That respondent is amply able to pay (Par. XVII, Tr. p. 9);

That the body of petitioner was taken for a public use and so used by respondent and has been damaged in such service;

Par. XVIII, Tr. p. 9

The adoption of the Declaration of Independence (Par. XIX, Tr. pp. 9, 10); of the Constitution of 1787 (Par. XX, Tr. p. 10); of the 5th and 7th Amendments in 1789 (Par. XXI, Tr. pp. 10, 11); and of the 13th Amendment 1861 to 1865 (Par. XXII, Tr. p. 11) are alleged;

It is alleged that petitioner's body is his own and not the property of the respondent or of any other group of its citizens; that the citizens who fight do not become the slaves, serfs or chattels of those who do not fight; that they are entitled to just compensation and to due process of law guaranteed by the Constitution;

Par. XXIIII, Tr. pp. 11, 12

Just compensation is defined (Par. XXIV, Tr. p. 12);

It is alleged that all laws of Congress now in force are based upon the theory that those who fight are the slaves, serfs or chattels of those who do not fight, to be sacrificed in the common defense, without legal obligation, and that payments made to them is gratuity or common charity; that charity does not pay debts;

Par. XXV, Tr. pp. 12, 13

That the earning power of man belongs to him and is property (Par. XXVI, Tr. p. 13); that the expendi-

ture of the bodily integrity of man and of his earning power in battle or in any other type of military service in time of war is the taking of private property for a public use, for which respondent is required by the 5th amendment to make just compensation, the same as for earning power in the form of ships, etc. (Par. XXVII, Tr. p. 13);

The unconstitutionality of the Economy Act of March 20, 1933, Public No. 2, 73rd Congress, 48 Stat. 11, is alleged;

Par. XXVIII, Tr. pp. 13, 14

That the constitutional provisions referred to in the petition are enforceable by the courts without the sanction of Congress, and that no consent to sue other than that implied in the 5th Amendment is necessary;

Par. XXIX and XXX, Tr. p. 14

That unless this Honorable Court grant the relief prayed for petitioner will be denied his constitutional rights;

Par. XXXI, Tr. p. 15

Prays for judgment construing the constitution and adjudging

1. That the taking of petitioner's body was the taking of private property for public use;

2. That the United States is obligated to make just compensation for war disabilities;

3. That such war disabled have a constitutional right to due process and other remedies;

4. That the United States has consented to be sued upon these claims;

5. For further relief.

Tr. pp. 15, 16

Respondent moved to dismiss upon the grounds, first, that the amended petition did not state facts to warrant recovery, and second, that the respondent had not consented to be sued.

Tr. p. 17

The District Court, after hearing argument, sustained the motion, filed its opinion (Tr. pp. 18-34) and entered judgment dismissing the cause (Tr. p. 35).

Petitioner filed in the district court his notice of appeal (Tr. p. 37), his bond for costs on appeal (Tr. pp. 38, 39), his designation of the record (Tr. p. 40), and in this Court filed his designation of points to be relied upon and the portion of the record to be printed (Tr. pp. 42-44).

The foregoing statement of facts is made for use in connection with the jurisdictional statement and in the main argument.

STATEMENT OF PLEADINGS AND OF STATUTES SHOWING JURISDICTION OF THE DISTRICT COURT AND OF THIS COURT.

The amended petition states a cause of action upon petitioner's construction of the constitution. Petitioner,

however, instead of asking ultimate relief in the form of a judgment, asks for a declaratory judgment construing the constitution and defining the rights of petitioner and of all others similarly situated.

Reference is made to the foregoing statement of facts.

Jurisdiction is conferred upon the District Court in the first instance and upon this Court upon appeal by the provisions of

Section 400, Title 28, USC.

That section gives the court jurisdiction to declare the law, "whether or not further relief *is or could be prayed.*"

The statements of the Supreme Court in the case of

Perry vs. U. S.
294 U. S. 330
79 L. ed. 912,

would seem to conclude the question of the power and the duty of this court to declare upon the substantive rights of disabled veterans under the constitutional provisions, even though it should decide that the alleged immunity from suit exists:

> "The fact that the United States may not be sued without its consent is a matter of procedure *which could not affect the legal and binding character of its contracts.* * * * *The contractual obligation still exists,* and despite infirmities of procedure, *remains binding upon the conscience of the sovereign.*"

So, if the basic obligation exists in the instant case, it is the duty of the Court to so declare; and perhaps, with the obligation established, the Congress, if it has a conscience, or perhaps in fear of adverse public opinion should it attempt to repudiate a constitutional obligation, might clothe the right with a remedy, if such action is necessary, which we deny.

SPECIFICATION OF ERRORS

1. The District Court erred in sustaining the first ground of said motion to dismiss;

2. The District Court erred in sustaining the second ground of said motion to dismiss;

3. The District Court erred in sustaining said motion to dismiss in its entirety;

4. The District Court erred in entering judgment dismissing this cause;

5. The District Court erred in not overruling the first ground of said motion to dismiss;

6. The District Court erred in not overruling the second ground of said motion to dismiss;

7. The District Court erred in not overruling said motion to dismiss in its entirety.

PROLOGUE

The purpose of this action is to ascertain whether a disabled war veteran has any rights under the constitu-

tion when his right to live is at stake, or whether the constitution was intended to apply to everyone but the disabled veteran.

The amended petition presents the following substantive propositions:

1. That this country owes an obligation under the constitution to compensate its disabled war veterans.

2. That such war disabled have the right, in case of dispute, to the benefit of the decent processes provided by the constitution for the trial of such obligation before independent courts not controlled by the political branches of government.

There is no middle ground. We owe this obligation or we owe nothing.

Congress says we owe nothing, and in legislation expresses this sentiment in accordance with the following propositions:

1. That this country owes nothing to its war disabled.

2. That whatever Congress does for them is common charity.

3. That the disabled soldier is not entitled to a trial, before independent tribunals, of the question how much of his life has been taken for a public use.

All of which means that Congress acknowledges no legal obligation to even remove the wounded from the battlefield or to bury the dead.

Acting upon this archaic and perverted theory, Congress, by the Economy Act of 1933, repealed all laws providing compensation to war disabled veterans, from the Spanish-American War down, cancelled the insurance contracts issued under the War Risk Act, under which thousands of war disabled were drawing payments, and placed the entire control of the destinies of our war disabled in the hands of the Veterans Administrator, and made his every decision, upon questions of *law or fact*, final and conclusive, and prohibited all courts from reviewing such decisions, by mandamus or otherwise.

Under a principle of law of universal application, any aggrieved person, even the inmate of a poor house or of a penitentiary, may have reviewed, by mandamus or other appropriate writ, errors committed by any board, bureau or commission in construing the law.

The Veterans Administrator, however, the autocrat, or his subordinate employees, may, under the provisions of the Economy Act, arbitrarily misconstrue any act of Congress, and the disabled veteran who is injured cannot appeal to any court or other official for a proper construction of the law.

No more autocratic institution ever existed in any of the monarchies or fascist states of Europe. History shows that a political dictator is always a tyrant, and experience with this dictator shows that the pattern has not changed.

Were a similar system of mock "due process of law" applied to all other classes of our citizens we would have

rebellion; rebellion warranted by the preamble to the Declaration of Independence.

This discrimination cannot be justified as an exercise by Congress of a proper legislative discretion. It can be justified only upon the theory that an 18-year-old boy who was blinded and suffered multiple amputations while defending this country is not entitled to the rights which are accorded to the tramp, to the criminal, to the enemy alien, or to the harlot.

It is not legislative discretion which impels Congress to legislate for a large and powerful group, the taxpayer, at the expense of a small and non-influential group, the disabled veteran, it is simply brutal, Hitlerian tyranny.

It was to prevent just such abuses that the Bill of Rights was adopted, and its enforcement entrusted to the judicial branch, an independent department of government.

If the judicial department, however, abdicates its prerogatives, and disregards its sacred trust, and permits Congress, under the guise of legislative discretion, to roam at large over the entire field of human rights, what recourse has the oppressed?

> "It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety to the citizen, *except in the protection of the judicial tribunals.*"

U. S. vs. Lee
16 Otto 196
27 L. ed. 171

As so aptly stated by James Wilson, a member of the Constitutional Convention of 1787:

> "Despotism comes on mankind in different shapes, sometimes in an Executive, sometimes in a military one. Is there no danger of a Legislative despotism? Theory and practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability."

It is because of its success in maintaining its disregard of the rights of disabled veterans that Congress makes its niggardly allowances to them. Under the present system, inaugurated and perpetuated by the Economy Act, allowances are not based on the cost of decent living, but like all other charitable contributions are no more than enough to keep body and soul together, with the necessary aid in many cases of charitable minded individuals and organizations.

If the recognition of our obligation to these disabled, and provision for the ordinary processes of determining the existence and extent of this obligation in the individual cases, would not involve larger outlay, what point is there in insulting the veteran by classing him as a mendicant instead of paying him as a matter of right?

No, the only excuse we can find for the theory of

gratuity is the evasion of the real cost of war, in the lives and earning power of the men who fought it.

If we couldn't afford to pay the cost of war, why didn't we let the Japs and Germans have us? The boys who fought the war didn't ask for a war, nor could they afford to lose their lives, their limbs or their health in defending us. We sent them out; and we now try to evade payment of *the cost to them* by repudiating not only a legal debt but a debt of honor of the highest grade. Not only that, we place them in a class below every other citizen in constitutional and decent rights.

The same persons who will agree with the ideology of Congress will view with complacency the payment of two or three hundred billions of profit to those who produced war material, profits made because the blood of American youth was being spilled on battlefields on five continents and the seven seas.

We are not waving the flag; we are just waving a million bloody uniforms.

The men who suffer from the wrongs of the present system are those who make their living by manual effort, and have not the political or economic power to protect themselves; and the constitution was designed primarily to protect the weak, not the strong, as the strong have sufficient political influence to more than protect themselves.

Since the beginning of organized government the man of the rank and file has been regimented and

pushed around to suit the whim of his masters. Formerly he was the property of the King, without rights, expendible without responsibility; and in this professedly free and democratic country this practice continues. Congress regards him as a tool, in effect a slave, *expendible in war without obligation to recompense.*

A soldier serves his time in the army in time of war, comes out disabled, and becomes a ward of the government.

A slave is disabled in his master's service, and he becomes a ward of his master.

Neither has any legal or constitutional rights with reference to his disabilities.

The soldier, being thus expendible without obligation to recompense, is in the same category as a disabled slave.

The constitution and its amendments were supposed to do away with the ideologies and the practices of monarchy, and to recognize the sovereign rights of the individual, no matter how lowly he may be.

We take for public use the ablebodied from every walk of life; and under that constitution we become responsible to them just as we would have become responsible to the owner of a ship, a plane, a gun, or any other paraphernalia of war.

We did not, however, take the ship, the plane or the gun under this power of eminent domain. We induced the producers to make them for us, at high salaries, high

wages, and fabulous profits, largely with cost-plus contracts, an incentive to build up costs so as to increase the plus; with the result that these producers now hold public bonds which constitute a mortgage of over 200 billion dollars upon this country, a mortgage which represents but a part of the profit the home front made out of this war; a mortgage we expect the returning veteran to help to pay.

If it is the duty of the ablebodied to give their bodies without recompense, then *it was the duty of the government to take what insensate material it needed, without payment of profit;* and the people of this country have thus been despoiled of the two or three hundred billion dollars of profit which was paid to these producers.

We boast of our equality, our free institutions, and our judicial system. Wonderful institutions for those who are permitted to enjoy them; wonderful for our enemies.

We freely permit the atmosphere of the sacred precincts of the Temple of Justice to be polluted by the effluvium of the foul reptile Yamashita, the Tiger of Malaya, hear him on the merits and permit him to invoke the very constitution he sought to destroy, lean over backwards to show how generous we are to our enemies, and at the same time cast the American youth who defeated Yamashita into outer darkness—bar him from these same courts upon a mere showing that he is a war veteran seeking compensation for disabilities

suffered by him in defending that constitution against the Yamashitas, the Mussolinis and the Hitlers.

Many years ago Congress opened the doors of our courts to every financial interest, war profiteers, and even aliens, and recently has extended the privilege of suing the United States in those courts upon practically every claim which could be asserted against the government, by any one *except the disabled soldier.*

It is no answer to this proposition to say that these war disabled are accorded due process of law because they may go before the kangaroo courts of the autocrat, the Veterans Administrator, a group of employees of the political branch of the debtor government, a political eleemosynary institution responsive to every suggestion from their political masters; with power to misconstrue the law in any way necessary to defeat the claim of a veteran, and the courts prohibited from reviewing their decisions, *even upon questions of law.*

If that is due process, *why not abolish our entire expensive judicial system and let low paid bureau clerks, without judicial training*, dispense "justice" for everyone?

No, that would be an injustice to the legal talent which occupies the benches of our federal courts, to say that an ordinary clerk is as competent to administer justice as the judges of our federal courts.

Yet that is just what they say with reference to the veteran; either that the veteran *is not entitled to justice,*

or that his case is as ably and as justly tried by a low paid politically controlled clerk of the Veterans Administration, without legal training or experience, as it would be tried by judges of proven training and legal ability and years of experience.

The theory of immunity of the United States from suit without the consent of Congress is a grotesque joke.

The uninitiated may think that the theory of immunity rests upon the principle that the person of the sovereign (a thing apart from and superior to the people) is too sacred to be brought into a court of justice at the suit of a common citizen, unless Congress permits it.

Congress has no sense of delicacy in this matter, for it now permits a harlot, who claims that the military police were unnecessarily rough and destructive in raiding her house of ill fame in an out-of-bounds section of a town occupied by troops, to sue the United States of America for damages to her property and her business.

No, there is no question of delicacy involved in this asserted defense. The only explanation is that it is used simply in an attempt to evade a just obligation established by the people themselves through the amendments to the constitution. Congress is evidently afraid that courts and juries would do them justice.

Wouldn't this story sound funny to an American youth who is studying the framework of our institutions of freedom—that the United States may be sued by a harlot but not by a disabled war veteran?

Our armies are raised by the power of government

to mobilize the energies of the nation, manpower and material, for defense.

What rule of logic or of common sense says that, except for the determination of what is just compensation, our obligation to pay for one kind of private property is different than our obligation to pay for another kind of private property; that we must pay fabulous sums for insensate property, but must not pay for human property and earning power, when both kinds of property are taken under the same extraordinary power and for the same purpose?

That if we commandeered a B-29, and drafted the body of our neighbor's boy to fly it over Tokyo, and both were shot up, we would be compelled under the Fifth Amendment to pay for the damage to the plane but would be under *no* obligation to pay for the damage to the body of the boy?

The macabre theory of Congress that these men have by their very service in war excluded themselves from the benefits of the constitution is a perversion of every principle of logic, of democracy, and of common decency, and violative of every constitutional principle.

For the moment the answers to the following questions hang upon the decision of this Court:

Have we deified wealth and set it above human life?

Are we a democracy, or just another political oligarchy?

Was the constitution made for everyone in the world except only the men who contributed of their bodies to its perpetuation?

ARGUMENT

For the purposes of the motion to dismiss, all of the facts pleaded in the amended complaint must be taken as true.

Our argument, therefore, will be based upon the premise that the petitioner was conscripted, served, and was injured as is alleged in detail in the petition, that the respondent repudiates its obligation to him, and that his body and its earning power are property and belong to him.

The legal issues involved in this appeal are as follows:

1. That a citizen disabled in war service is entitled to contribution, under common law principles and under the compact we call the Constitution, for the loss of bodily integrity and impairment or loss of earning power.
2. That loss of bodily integrity and impairment or loss of earning power suffered by a conscripted citizen in war service is private property taken for public use under the last clause of the Fifth Amendment.
3. That as a corollary to the foregoing propositions, our war disabled are entitled to the due process of law guaranteed by the Bill of Rights.
4. That the war disabled have the right to sue the United States in the courts of the United States, without express sanction of Congress, and in spite of its denial of that right.

I.

A CITIZEN DISABLED IN WAR SERVICE IS ENTITLED TO CONTRIBUTION UNDER COMMON LAW PRINCIPLES AND UNDER THE COMPACT WE NOW CALL THE CONSTITUTION FOR THE LOSS OF BODILY INTEGRITY AND IMPAIRMENT OR LOSS OF EARNING POWER.

This branch of the argument involves a discussion of the principles of free government and of sovereignty, as applied to a democracy.

A democracy operating under a republican form of government—the only form of government applicable to a democracy—is simply a partnership in which the partners have agreed to surrender proportionately of their income and property for the purpose of maintaining government, and to refrain from infringing upon the rights of other members of that society.

However, an implied provision of this partnership compact is that one who contributes *more* than his proportionate share to the common good or to the common defense, whether in bodily integrity and earning power or in insensate property, be compensated for such excess.

In this respect the country itself, its products, the tangible property of the people, and their lives and liberties, constitute the partnership assets, and constitute a fund within the meaning of the decision of the Supreme Court of the United States in

Trustees vs. Greenough
105 U. S. 527
26 L. ed. 1157

There the Court said, and in doing so but stated a natural principle of equity, that one who, for the protection of a fund in which many are interested, contributes more than his proportionate share to its protection, is entitled to reimbursement from the fund.

Congress concedes that the man who so contributes *insensate* property in excess of his proportionate share is entitled to contribution for its value, plus a good profit, but says that the man of the rank and file who contributes of his body and of his earning power owes the strange duty of thus sacrificing his most valuable property without recompense.

Such a principle is consistent with the tyrannies of the dark ages, but is alien to a modern democracy, where the rights of the individual are paramount.

That principle can apply only to a sovereignty not of the people, a sovereignty which does not exist in this country.

The idea seems to prevail among lawmakers and other members of our central government, and among citizens generally, that there is some sovereign power, separate and apart from and superior to the people, to which the individual citizen owes blind allegiance, and that the citizen owes the duty to gratuitously sacrifice his body in war at the behest of this mysterious and heartless sovereign.

If this theory be correct, then why does not the war emergency require that ordinary property be also yielded to the sovereign for war purposes without recompense, or at least without profit?

Could it be that the application to ordinary property of the principle which actuates Congress would impinge upon interests too great and too powerful; and that the plan is to use the money which would be required to adequately compensate the man of the rank and file for the damage done to his body in winning a war to pay the tycoon for his insensate property, plus a wide margin of profit?

Certainly the exemption of ordinary property rights from the ruthless exercise of the right of survival is not justified by any rule of logic, nor is it consistent with the principle of democratic equality.

In the political and intellectual confusion of the last few decades we seem to have forgotten the basic principles of democracy.

The gradual centralization of power at the seat of government and the multiplication and extension of federal controls into every nook and corner of the country has gradually created the impression that these tentacles of power emanate from a sovereign power apart from the people, a sovereignty which resides in Washington.

This idea, of course, is utterly fallacious. While the sovereignty of the people of the United States is given effect through the *governmental agencies* established at Washington, and operating under powers delegated to them by the states, ultimate sovereignty was never delegated to the federal government, but is in the individual citizen. This principle is clearly exemplified by the

language of the Tenth Amendment to the Federal Constitution:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

That amendment clearly distinguishes the difference between the United States the government, operating under delegated powers, and the United States the sovereign people.

When the government thus established to handle the affairs of all the people, and acting, not as a sovereign, but as the agent of the sovereign people, conscripted 15 million citizens into the service to defend this country, the 125 million who remained at home and controlled the machinery of government did not become the sovereign masters of the 15 million who were sent out. The latter were still sovereigns, equally with those who remained at home.

Any other theory would make those who fight the chattels of those who do not fight, an idea which is repugnant to every democratic principle.

If in an association of a dozen persons an emergency arose which threatened the lives and property of all twelve, and ten of them pushed the other two off the deep end and made them defend the association and its property, and if one of these two were killed and the other disabled, would any court in Christendom say that the disabled survivor and the dependents of the

dead would not have a legal claim against the ten for contribution?

And the same principle applies in equal force to the disabled and the dependents of the dead when 125 million people push the other 15 million off the deep end. This is the basis of the compact we call the Constitution; and we cannot evade the obligation by calling the association the United States of America, instead of the "Association of the American People," and hiding behind this imaginary sovereignty.

To summarize:

1. The constitution is a partnership compact.

2. Under that compact the principle of contribution protects the members of our society who contribute more than their proportionate share to the common good, or to the common defense.

3. The only sovereignty in the United States is the aggregate sovereignty of *all* the sovereign people, and that sovereignty cannot be used to give one group of sovereigns an unconscionable advantage over another group of sovereigns.

4. This sovereignty has no play in the question of the contribution by a part of the people of more than their proportionate share, except in the exercise of the taxing power for the purpose of reimbursing for such excess contribution.

II.

IMPAIRMENT OF BODILY INTEGRITY AND LOSS OR IMPAIRMENT OF EARNING POWER SUFFERED BY A CONSCRIPTED CITIZEN IN WAR SERVICE IS PRIVATE PROPERTY TAKEN FOR PUBLIC USE UNDER THE PROVISIONS OF THE FIFTH AMENDMENT.

Under the present state of the pleadings the bare recital of this proposition is sufficient.

We took the bodies of our youth by conscription and sent them into combat. If they were wounded or otherwise disabled in such service, we took for a public use that much of their lives, and under the Fifth Amendment they have a constitutional right to just compensation.

That their bodies and their earning power are property and belong to them is conceded for the purposes of the motion to dismiss.

If this cause should be reversed, the respondent, by appropriate pleading, may put the allegations of the amended petition in issue, and the truth of these allegations must then be tried out.

Until then, however, we rest upon the facts as so admitted.

III.

AS A COROLLARY TO THE FOREGOING PROPOSITIONS OUR WAR DISABLED ARE ENTITLED TO THE DUE PROCESS OF LAW GUARANTEED BY THE BILL OF RIGHTS.

As we have already observed, the right to trial of

issues of law and of fact in independent courts, with all the incidents of due process, flows naturally from the obligation of the United States to its disabled defenders; so that any argument under this head is but an extension of the argument found in the preceding divisions of this brief.

However, we desire to stress the importance of due process of law and the part which independent courts play in democratic government.

The fight to escape controlled "courts", the mock, or "kangaroo" courts of controlled political bureaus, has continued sporadically through the centuries. The Star Chamber is an ancient example.

Among the grounds of complaint against the King of England contained in the Declaration of Independence of July 4th, 1776, we find the following:

> "He has obstructed the administration of justice, by refusing to assent to laws for establishing judiciary powers.
>
> "He has made judges *dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.*"

In the second complaint above noted we find described with deadly accuracy the status of the so-called judges of the Veterans Administration who pass finally upon the rights of our war disabled.

From the chief down they are dependent upon their political overlords for the "tenure of their offices," and "the amount and payment of their salaries."

As we have repeatedly said, no other class of our citizens than our war disabled veterans is deprived of the decent processes contemplated by the constitution in the determination of their vital rights. No other person than a disabled soldier is required to have his rights finally determined by the clerical employees of his debtor.

There is a presumption in the law that official duty has been performed. Usually that is probably the weakest presumption known to the law; but in the case of these bureau courts it is the most powerful presumption known to the law. These so-called "judges", political employees, are employed, *not to be independent*, but to carry out the wishes of their employers, or lose their jobs.

The theory upon which such procedure can be justified is the monarchistic theory of Congress, that we owe no obligation to our war disabled, and that when Congress in a burst of generosity provides for niggardly payments of charity to them it may clothe such provisions with humiliating and indecent conditions, upon the theory that "beggars cannot be choosers", and if denied participation in the benefits of such provisions by the political hirelings he cannot look to the courts for help, no matter how arbitrary nor how contrary to law such denial may be.

Assuming (without conceding) that such practice may be warranted under conditions where only incidental property or financial benefits are involved, to

apply such practices to the cases of disabled veterans whose very livelihood is at stake is contrary to every democratic principle.

> "*If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has just claim to well regulated liberty and the protection of personal rights.*" (Italics ours)
>
> U. S. vs. Lee,
> 16 Otto 196
> 27 L. ed. 171

If the lords of industry, labor, and the ordinary citizen, were denied their right to try out vital issues before independent tribunals, as are the disabled veterans, we would have rebellion.

Under our constitution the federal judiciary is the keeper of the fires of freedom—*the final bulwark of liberty*.

So long as that judiciary maintains its independence, is immune to considerations of expediency, to the arbitrary pressure of irresponsible political and financial interests, with a conscience attuned to the demands of justice, and interprets our constitution as a compact essentially designed to preserve and promote human rights, just so long is our democracy secure.

With such a judiciary to check the encroachments of the executive and the legislative branches, and to try issues arrising between the citizen and the government, *including those in which the disabled war veteran*

is a party, the declared objective of the constitution, "to establish justice," will be attained; but if the judiciary yields its prerogatives, and permits the political branches of government to make a football of the constitution, parcel out its benefits according to its political whims, we are in a sorry plight indeed.

IV.

IMMUNITY OF THE UNITED STATES FROM SUIT.

The statement that the United States cannot be sued without the consent of Congress has become as trite, and just as meaningless, as the old jingle, "A pint's a pound the world around." A pint of water weighs the same as a pint of mercury, according to this formula.

All limitations contained in the Bill of Rights are directed at Congress and the executive, and are intended to prevent the encroachment of the political branches of government upon the rights guaranteed by the constitution to the citizen. That is the sole purpose of the Bill of Rights.

It would be absurd to say that a citizen cannot sue the United States, if suit be necessary to enforce a constitutional provision adopted for his protection, without the consent of the legislative and executive, *the very agents such provision was designed to restrain.*

The people are the sovereign, and when the people through constitutional enactment extend certain rights and immunities to the individual citizen, there is the implied consent that these rights and immunities may

be enforced in any appropriate manner, by suit, if necessary.

The last proviso of the Fifth Amendment is the only provision of the constitution and its amendments which in the final analysis requires suit against the United States.

In this connection it is well to observe that that provision is solely and peculiarly designed as a limitation upon the power of Congress and the executive.

Under the constitution, by virtue of specific provisions, or as necessarily incident to powers specifically granted, Congress has the power to take all private property necessary for the national defense, *and has the power to pay for it.*

Prior to 1789, however, there was no specific provision *requiring* Congress to pay for private property taken for public use.

The sole purpose of the last clause in the Fifth Amendment was to *compel* payment for such property so taken.

It was also the purpose, in enacting the Bill of Rights, *to insure the equal distribution of its protection to all citizens similarly situated*, instead of leaving the rights guaranteed by the first ten amendments to be parcelled out by Congress as political largess, which has been the practice, in all ages, of political governments not restrained by a constitution and an independent judiciary.

Our government consists of three branches, operating under powers and under limitations prescribed by the constitution. They are, the legislative, the executive, and the judicial departments, each independent of the other.

The independent judiciary marks the difference between a democracy and a totalitarian state. The judiciary is the guardian of the rights guaranteed by the Bill of Rights to the individual citizen, and is the real bulwark of liberty.

Should the judiciary abdicate its prerogatives and disregard its sacred trust, and permit the legislative and the executive to encroach upon the rights guaranteed to the citizen by the constitution, we may as well burn the Bill of Rights as a meaningless gesture.

James Madison, frequently referred to as the "Father of the Constitution," a man who knew more of the real genius as well as the tangible structure of the constitution than any man who has followed him, said, in offering the first ten amendments to the First Congress:

> "If they are incorporated into the constitution, *independent courts of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the declaration of rights.*"

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To say that these "independent courts" must ask Congress and the executive branch for permission to

entertain a suit to resist "assumption of power in the legislative or executive," or "encroachment upon rights expressly stipulated for in the Declaration of Rights," such as the taking of private property without just compensation under the 5th Amendment, would be to say that these "independent courts of justice" are merely lackeys of the political branches of government. The adoption of these amendments, with such a construction, would be as futile as locking up a burglar and then giving him the key to the jail.

If such be the law, Congress, by repealing every law granting permission to sue the United States, including the Court of Claims Act, could take private property for public use at will and without compensation, and snap its fingers at the Fifth Amendment; a conclusion which shocks the intelligence of every understanding American.

To adopt some of the language of Justice Miller, upon the same point, in the case of

U. S. vs. Lee,
16 Otto 196,
27 L. ed. 171:

> "*If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has just claim to well regulated liberty and the protection of personal rights.*" (Italics ours)

In the volumes of loose language which has been used in discussing this question we find an almost universal oversight of the basic principles involved.

First: Only in cases of rights *created by an Act of Congress* may Congress deny due process of law and require rights claimed under such law to be tried by mock courts, set up within an administrative body, and presided over by political hirelings under instructions from and subject to the control of their political overlords.

Second: *Congress has no control whatsoever, by action or by non-action, over the enforcement of a right running directly from the constitution or one of its amendments to the citizen.*

As long as there is a federal judge appointed under the power given by Article III of the constitution, and there is a place for him to sit or stand, he has the power, and it is his duty, to hear the complaint of a citizen who has been denied a constitutional right.

Article III establishes our judicial system, and defines the primary jurisdiction of the Courts established under the authority of that article.

Section 2 says that "the judicial power *shall* extend to all cases, in law and equity, *arising under this constitution*, * * * * to *controversies in which the United States shall be a party*", etc.

This section fixes the jurisdiction of the federal courts of general jurisdiction, and these powers cannot be subtracted from by Congress or the executive or both. When the federal trial and intermediate appellate courts were provided for by law, their jurisdiction was

fixed by the constitution. Congress might define, and perhaps enlarge in the interests of justice or of good government, *but it cannot restrict the jurisdiction fixed by the provisions of Article III.*

Any other construction would make of Congress the supreme power of government—a sovereign, and the citizen a subject. The judicial branch would be reduced to the role of an appendage of this political oligarchy.

The bare statement of this difference between the power of Congress in prescribing process for rights initiated by its own acts, and its lack of power to control the enjoyment by the citizen of rights guaranteed directly to him by the constitution, and its lack of constitutional power to prevent the courts from entertaining suits under these constitutional provisions, makes it unnecessary to review the mulitude of decisions affecting the first class of cases.

We will confine our discussion mainly to two decisions of the Supreme Court of the United States which establish the principle involved in the second proposition, that no action or non-action by Congress can deprive the courts of jurisdiction to try any case arising directly under the constitution or any of its amendments.

The first case is that of

U. S. vs. Lee
16 Otto 196
27 L. ed. 171

Briefly stated, the facts in that case were these:

Lee sued Kaufman and Strong and others, in the Virginia Court, to recover land known as the Arlington Estate, upon which the United States had established a fort and a cemetery. Kaufman and Strong were the agents of the government and occupied the land for the government. The action was in ejectment.

The case was later removed into the Circuit Court of the United States. After such removal the United States Attorney General filed in the proceeding a paper in which he stated that the land in controversy was

> "*occupied and possessed by the United States through its officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station,* and as a national cemetery established for the burial of deceased soldiers and sailors." (Italics ours)

and moved the dismissal of the action for lack of jurisdiction.

The interest of the United States was thus squarely presented. The government must necessarily act through its officers and agents, and even if the United States had been named a defendant and a judgment had been entered against it by name, such judgment would have been enforced by the ejectment of these same agents.

The Circuit Court rendered judgment against Kaufman and Strong, thus ejecting the United States as effectually as though it had been a party defendant *ea nomine.*

The United States appealed to the Supreme Court, thereby making itself a party defendant as effectually as though it had originally been named a defendant.

Carson Inv. Co. vs. A. C. M. Co.,
26 Fed. (N.S.) 651

Certiorari denied
278 U. S. 635
73 L. ed. 551

Considering the question, "Could any action be maintained against the defendants for the possession of the land in controversy, *under the circumstances of the relation of that possession to the United States?*" Mr. Justice Miller went fully into the question of sovereign immunity from suit. The judgment was affirmed by the Supreme Court, which means that the officers of the government, *who were occupying the land for the government*, were ejected.

Justice Miller analyzed the sovereignty of the United States and showed the difference between the sovereignty of the King of England and the sovereignty of the people of the United States. After discussing the petition of right in England and the immunity of the King from suit before the petition of right was granted, he says:

> "What were the reasons which forbade that the King should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's Court. No such reason exists in our government, as process runs in the name of the President and may be served on the Attorney-General. * * * * *Nor can it be said that the dignity of the Government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts and submitting its rights, as against the citizens, to their judgment.*"

When the matter of delicacy is disposed of, as is done by the quoted language, the only visible purpose of immunity is the attempted evasion by Congress, a creature of the Constitution, of obligations deliberately guaranteed by the Constitution.

When the people, through direct constitutional enactment, acknowledge obligations, every rule of logic and of decency, and every principle of democracy force the conclusion that they intended to pay their debts; and no lesser power than the people themselves has the right to put the people in the position of a common dead beat —of repudiating the obligations they have thus deliberately assumed.

Mr. Justice Miller further says:

> "As we have no person in this government who exercises supreme executive power or performs the

public duties of a sovereign, *it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. * * * * The principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.*"

"A pint's a pound," etc.

The Court, on page 177 of the Lawyer's Edition, discusses the situation in England and then says:

> "Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no such person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him *when it is well administered.* When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, *not even the United States*, should prevent him from using the means which the law gives him, for the protection and enforcement of that right."

Again:

> "Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and *without any compensation. Undoubtedly, those provisions of the Constitution are of that character which it is intended the courts*

shall enforce, when cases involving their operation and effect are brought before them. (See Madison's remarks, supra) The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, *are those in which life or liberty was invaded by persons assuming to act under the authority of the Government.*

"If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the Government, *what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?*

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. *It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by officers of the Government,* professing to act in its name. There remains to him but the *alternative of resistance,* which may amount to crime. * * * *

"The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be that the executive possessed no such power. *Not only*

that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, *or to take private property without just compensation.*

"These provisions for the security of the rights of the citizen stand in the Constitution *in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution.*

* * * * *

"Shall it be said in the face of all this, *and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional,* that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and *without any compensation,* because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has just claim to well regulated liberty and the protection of personal rights."

We have quoted at length from the decision in the Lee case because it is conclusive upon the proposition that an action may be maintained against the United

States if necessary to enforce a right flowing directly from the Constitution.

When the Supreme Court, upon the appeal of the United States, with an interest in the subject matter asserted in the case by the United States itself, entered judgment against the agents of the United States, it established the law of exemption as applied to suits to enforce a right flowing directly from the constitution, and established the principle that the Fifth Amendment necessarily carries the right to sue.

At the time the Lee case was decided, *Congress had not consented to suit upon an obligation arising under the Constitution,* and the decision in that case is conclusive upon the proposition that the consent of Congress was not necessary.

In this connection it is well to note that the broad statements of Mr. Justice Brewer in the case of

Schillinger vs. U. S.
155 U. S. 162
39 L. ed. 108

decided in 1894, seven years after the passage of the Tucker Act, at a time when claims arising under the constitution were included in the Court of Claims Act, were *obiter dicta*—entirely gratuitous. The only question presented in that case was whether the suit involved a tort, torts being excluded from the court of claims act.

The next case for consideration is that of

Great Falls Mfg. Co. vs. U. S.
112 U. S. 645
28 L. ed. 846

That case was decided three years before the passage of the Tucker Act which for the first time gave the Court of Claims jurisdiction of "claims arising under the constitution."

No act for the payment of the value of the property taken had been passed by Congress, but on the other hand the government tried to evade payment.

The main question was whether the property for the taking of which damages was sought had been taken by the government, or whether there had been a tortious taking by an agent of the government. The Court of Claims Act expressly excluded tort actions.

Having found that the property was taken by virtue of an act of Congress, the Court said:

> "In that view, we are of the opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for a public use, is under an obligation, *imposed by the constitution*, to make compensation."

Judgment in favor of the Great Falls Manufacturing Company was affirmed.

That decision decides squarely the question presented in the instant case.

The Court of Claims Act did not empower the Court of Claims to entertain a suit "arising under the constitution"; so that the decision was that a suit upon a right arising under the constitution could be maintained without Congressional action.

The Court of Claims being a court of limited jurisdiction, the inclusion of claims arising under the constitution simply had the effect of enlarging the jurisdiction of that court, and is not to be taken as even a suggestion that anyone thought that consent to sue upon such a claim was necessary.

These two cases affirm the propositions:

1. That the United States may be sued upon a right arising directly from the constitution or any of its amendments, regardless of action or non-action by Congress, and

2. That Congress is bound by these constitutional provisions, and cannot parcel out the benefits of the Bill of Rights to suit its political whims—grant them to its favorites and deny them to those not in its favor; grant to the strong the right to sue the United States upon those provisions, and deny that privilege to the weak; grant those rights to the wealthy and deny them to those in straitened circumstances.

EPILOGUE

The term "patriotism" has been too often used as an excuse for the denial of any obligation to the human

wreckage of war.

In such use of the term it is assumed that the citizen who is fired with patriotic ardor to the extent that he goes into battle for his fellow citizens and loses limb or health as the result of such service has received his full reward in the satisfaction of this overpowering emotion, and is required to accept disability as a part of the price of such satisfaction; and that the nation which has benefitted by his service owes him no duty, but may let him die in the gutter of the country he has helped to save, without thereby doing violence to any legal obligation.

Whatever illusive color such excuse may have had in the days when our wars were fought by volunteers, it has no color in the light of modern conditions.

When we conscripted our virile manpower to fight this war we stood upon our constitutional right to *require* the bodily sacrifice of our young men in our defense, regardless of any patriotic urge; and we consequently assumed the corresponding obligation which all democratic societies owe to their individual members,—the obligation to compensate the citizen who is required to sacrifice for the common good beyond his proportionate share.

When a citizen, responding to this call, throws his body into the breach, abandons all personal interests and family ties, takes on the hazards, the hardships and the discomforts of military life in time of war, *he then and thereby satisfies all the demands of patriotism.*

If he is discharged from that service disabled, *at that moment there arises an immediate obligation on the part of his country to adequately compensate him for his disabilities, suffered by him in performing his patriotic duty, a duty which had been fully performed when he was discharged.*

No aspersions can be cast upon him or upon his patriotism if he insists that, after he has performed his patriotic duty, his country, the other party to the bargain, perform *its* constitutional duty to legally compensate him for his loss.

Under the conscription act there was a file of bayonets at his back to guarantee that *he* responded to this call of "patriotism"; and by every token,—reason, common decency, the principles of democracy, and the constitution itself,—he is entitled to the milder bayonets of due process of law for the enforcement of the "patriotic" duty of the home front.

In this case we are presenting for the first time in history the question of the right of a citizen disabled in military service in time of war to the benefits of the Constitution in defending which he lost his bodily integrity and his earning power.

We are standing squarely upon the constitution, which is our controlling authority, and we are thus spared the arduous and fruitless task of wading through a quagmire of decisions, none of which, when stripped of *obiter dicta* and limited to the facts in the respective cases, touches the exact question now before the court.

Some decisions which *have* decided the principles involved, and in which the facts required such rulings, are analyzed at length.

The obligation of this country under the general compact to compensate the citizen who has contributed more than his proportionate share is founded upon natural justice—common law—and the decisions of the highest courts.

Under the Fifth Amendment, which requires no interpretation, the taking of private property for public use gives rise to a right to recover just compensation. That bodily integrity and earning power are private property is conceded for the purposes of the motion to dismiss, and indeed cannot be gainsaid. It is the earning power of man which makes all insensate property fit for human use; it is the basis of recovery in every personal injury suit; it is recognized by the government in facilitating, as it is now doing, the recovery by American citizens for personal injury suffered at the hands of enemies while prisoners of war.

In short, anything which can be evaluated in terms of money is property within the meaning of the constitution.

Doubtless due to our unhappy presentation in the Court below, the District Judge seems to have missed the points we tried to make.

For example: We referred to the Dred Scott case and the 13th amendment as authority for the proposition that the human body and its earning power are

property, that they are susceptible of ownership, that the United States does not own the body of the citizen under the 13th Amendment, and that the citizen is the owner of his body and of his earning power.

We all know that one of the basic differences between the fascist state and a democracy is that the fascist state owns the body of the subject, and that the democracy does *not* own the body of the citizen.

We do not question the power or the duty of Congress to raise and equip armies for defense, but we do question the right of Congress or of our people to conscript our boys to fight a war without assuming responsibility to them for the damage done to their bodies and their earning power in our defense—a portion of their lives expended in a public use—the same as we are responsible to those who furnish equipment for our armies.

The opinion of the court below is pregnant with another thought; that these boys were just out fighting for themselves, and therefore should themselves assume responsibility for what happened to them.

If that is logic, then why wouldn't the same principle apply to the man who furnished the rifle and the bayonet and the ammunition the soldier used? Would he not be doing it for his own protection, and should he not furnish it for nothing? Or should the soldier be charged with the gun and the bayonet and the ammunition, used by him in exterminating Japs?

Also, who was fighting for the people who were going about their business as usual, furnishing no material and no service, living in peace and security?

We will not try to make sense out of this proposition.

If these boys owed the strange duty of throwing everything they had into the struggle, property, prospects, and their bodies, without obligation upon anybody to repay them for loss of earning power through disability, why didn't everybody in this country owe the same duty to contribute everything they had that could be used in defense, and without obligation? Each one, according to the theory of the lower court, was fighting for himself.

This is a strange doctrine to advance after the citizens who furnished material have been paid fabulous sums, not only the value of their property but a wide margin of profit.

It will doubtless be said that human property was not considered by the First Congress when it submitted the first ten amendments.

Neither did the constitutional convention of 1787 know, or even dream, that the interstate commerce clause of Article I would cover the migrations of the railroad train, the automobile, or the aeroplane, nor communication by telephone, telegraph, or radio; nor that the power of Congress to raise and supply armies would involve the machine gun, the flame thrower, or the atomic bomb.

Nor did they know that in the 20th century the United States would be regularly conscripting the bodies of all of our virile youth and sending them out into all the hellholes of the world to fight every form of savagery, or that the number of our war dead and disabled would at one time be nearly equal to the entire population of the colonies at the time the First Congress met.

However, we are not required to search the minds of the members of the first congress which submitted the first ten amendments, or of the state legislatures which ratified them, to ascertain the thoughts they entertained.

The only tangible evidence of what they meant is what they said. The general principles laid down in the ten amendments apply to whatever may at any time in our political, economic, or social progress come within their broad purpose, to safeguard and promote the personal rights of the citizen.

Changing thought, as well as changing conditions, have affected the application of constitutional provisions. Decisions of the Supreme Court are constantly being reversed to accommodate those changes.

One thing is certain. The first ten amendments are warmly human, and are designed to protect the individual citizen in his daily life.

A citizen is presumed to be entitled to the benefit of all the provisions of the Bill of Rights, and its express language is not to be warped, as Congress has warped not only the constitution but every decent principle of

law and natural justice, in order to defeat the right of the disabled citizen to its benefits.

This reference to Congress is not gratuitous. It is simply an interpretation of the Economy Act, the most shocking piece of legislation ever passed by a professedly decent legislative body.

Would any legislative body that even pretended to be guided by principles of justice and the constitution have attempted to wipe out the war risk insurance contracts under which thousands of disabled veterans who had paid in premiums and in blood, to "maintain the credit of the United States Government," without at the same time cancelling *all other* contract obligations of the government, including government bonds?

And would any other group of our people than the disabled veterans submit tamely to the denial of access to our courts in the trial of their right to live, and the commitment of all these rights to a political dictator, a term synonymous with "tyrant", with power to neutralize the benefit of any act of Congress? A dictator with power to neutralize the 20% increase of pensions recently voted, or any other increase which may hereafter be voted, by Congress—a convenient tool which makes it possible for Congress to make a bountiful gesture with the knowledge that it will be rendered innocuous by this politically controlled employee?

The current history of the Economy Act indicates the forces that were backing it. When we consider who must pay the heavy end of the cost of recompensing

our war disabled,—the interests who took the lion's share of the profits of war,—it is easy to understand why Congress attempts to make a disabled war veteran try to live like a white man on $38.07 per month and raise a family (see Administrator's report for year ending June 30, 1945), when everyone knows that in this country no man can live and support a family and give his children an opportunity to grow up *not* underprivileged on less than $200.00 per month.

The gist of it all is that when a war is upon us we insist that we can't defend ourselves and on bended knee beseech the youth of America, from 16 years up to save us, and by the time the last gun is fired we are ready to brush them off, *tell them they were just out fighting for themselves,* deny them everything we willingly give to the profiteer, the criminal, the harlot, *due process of law,* make them practically men without a country, all to save ourselves from our obligation which arises from their payment of the real price of liberty, *the cost to them,* in life, limb and health.

"Oh, Liberty! What crimes are committed in thy name!"

Again we say, we are not waving the flag. We are just waving a million bloody uniforms.

The denial of the right to the trial of issues before an independent tribunal is not merely an academic proposition. The acquisition of that right has cost untold bloodshed; it is the essence of liberty.

Why does Congress so willingly give everyone in the world, but the disabled soldier,—the profiteer, labor, aliens, even the harlot,—the right to trial before tribunals not controlled by their debtors?

Because these interests represent power, while the disabled veteran who is getting the worst of the deal is relatively weak. Congress knows that if they were admitted to the courts they would get justice, and that is not what Congress wants. It would cost more money; and they want to keep political control of the rights of the disabled veteran so that they can cut him off whenever the time seems right.

The history of war risk insurance suits shows that but a small percentage of those suits were lost in court, and every one had been denied by the Veterans Administration.

It is an insult to every decent American that these boys, who, as have the boys of previous generations, have saved our lives, our liberties, and our property, are not accorded greater rights than the ordinary citizen, instead of being placed in the lowest category of human beings, denied *every* constitutional right and decent process of law when their whole future is tied up in the matter of just compensation for the lost earning power which was their only guaranty of an honorable livelihood.

The theory of non-liability, of mendicancy, is based upon the assumption that any man who will do the dirty, hard, and dangerous fighting for his country is

necessarily a person of low character, not fit to enter a court of justice, or to enjoy any of the decent processes which are freely made available to Yamashita, the Tiger of Malaya, and to the harlot.

It may be said that many of our remarks are beside the issue.

Would any self-respecting court undertake to adjudicate rights in the grocery business without acquiring some knowledge of the grocery business?

Has any court the right to try out the constitutional and vital rights of three million war disabled men without acquainting itself somewhat with the conditions which surround them, and the evils resulting from the denial of constitutional rights?

———

We submit that the judgment of the lower court should be reversed with instructions to the lower court to overrule the motion to dismiss in its entirety.

Respectfully,

JOHN W. MAHAN
C. E. PEW
Attorneys for Appellant.

Note:

I assume sole responsibility for any statements in this brief which may shock the Court.

C. E. PEW
Of Counsel.

No. 11404

In the United States Circuit Court of Appeals for the Ninth Circuit

EDWARD C. COMMERS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA, HELENA DIVISION

BRIEF FOR THE APPELLEE

JOHN B. TANSIL,
United States Attorney.
FRANCIS J. McGAN,
Attorney, Department of Justice.

JOHN F. SONNETT,
Assistant Attorney General.
SEARCY L. JOHNSON,
Special Assistant to the Attorney General.
D. VANCE SWANN,
Attorney, Department of Justice.
THOMAS E. WALSH,
Attorney, Department of Justice.

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No. 11404

EDWARD C. COMMERS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA, HELENA DIVISION

BRIEF FOR THE APPELLEE

STATEMENT

This is an action for a declaratory judgment brought by the appellant against the United States upon the theory that when appellant was drafted for military service his body, which was his private property was taken by the Government, and that he is entitled to just compensation therefor, under the Fifth Amendment to the Constitution. Jurisdiction is sought to be invoked under the Fifth Amendment, appellant alleging that no consent to sue, other than that implied in the Fifth Amendment, is necessary (R. 14). The petition contained a prayer for a declaratory judgment construing the Constitution and adjudging (1) that the taking of petitioner's body and

its earning power for military service was a taking of private property for public use; (2) that the United States is obligated to make just compensation to petitioner and all other veterans disabled in war; (3) that petitioner and all other such war disabled have a Constitutional right to fully try their claims for bodily impairment in District Courts of the United States; (4) that the United States has consented to be sued upon these claims, and (5) for further relief (R. 15–16).

A motion to dismiss was filed by the United States, upon the grounds (1) that the amended petition for declaratory judgment failed to state a claim against the respondent upon which relief could be granted, and (2) that the court was without jurisdiction to hear and determine the cause, for the reason that the United States has not consented to such suit (R. 17). The motion was granted (R. 34), the lower court rendering an opinion (R. 18–34), holding that appellant's contention, that military service in time of war constitutes a taking of private property without just compensation in violation of the Fifth Amendment to the Constitution, was without merit, and that the court lacked jurisdiction to entertain the action. Judgment of dismissal was entered July 29, 1946 (R. 35), and notice of appeal filed August 1, 1946 (R. 37).

On this appeal the United States contends that the action was properly dismissed for the reasons fully set forth in the lower court's opinion (R. 18–34).

ARGUMENT

I

The Congress has the power, under the Constitution, to declare and wage war, and, in the exercise of this power, may conscript the citizenry needed for this purpose without regard to the individual citizen's pecuniary interests, and, hence, the appellant has failed to state a cause of action upon which relief may be granted

One of the paramount powers conferred by the Constitution upon the Congress is the power to declare and wage war, and, in the exercise of this power, Congress clearly has the right to conscript citizens for military service. *Selective Draft Law Cases,* 245 U. S. 366; *United States* v. *Macintosh,* 283 U. S. 605; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Hirabayashi* v. *United States,* 320 U. S. 81, 93; *Tatum* v. *United States,* 146 F. (2d) 406 (C. C. A. 9th); *Hopper* v. *United States,* 142 F. (2d) 181 (C. C. A. 9th); *Local Draft Board No. 1 of Silver Bow County, Montana,* v. *Connors,* 124 F. (2d) 388 (C. C. A. 9th). In *Selective Draft Law Cases, supra,* the Supreme Court stated (p. 377):

> The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; * * * to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; * * * to make rules for the government and regulation of the land and naval forces" Article I,

> § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" Article I, § 8.
>
> As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. * * *.

And, as stated by the Supreme Court in *United States* v. *Macintosh, supra* (p. 622):

> The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to "provide for the common defense." In express terms Congress is empowered "to declare war," which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and "to raise * * * armies," which necessarily connotes the like power to say who shall serve in them and in what way.

Also, as stated by this court in *Tatum* v. *United States, supra* (p. 407):

> The right of Congress to impose upon our citizenry the burden of serving in the armed forces is not questioned. The Supreme Court * * * makes clear the power of Congress to enlist the manpower of the nation for the prosecution of war and to subject to military service both the willing and the unwilling. * *. *.

This power is not limited or restricted, or conditioned upon the payment of just compensation, under the Fifth Amendment, as the appellant contends. *Jacobson* v. *Massachusetts, supra; United States* v. *Macintosh, supra; Weightman* v. *United States,* 142 F. (2d) 188 (C. C. A. 1st); *Kramer* v. *United States,* 147 F. (2d) 756 (C. C. A. 6th). In *Jacobson* v. *Massachusetts, supra,* the Supreme Court said (p. 29):

> The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer* v. *Louisiana,* 165 U. S. 578; and yet he may be compelled, by force if need be against his will and *without regard to his personal wishes or his pecuniary interest,* or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. * * *. [Italics supplied.]

Also, as stated by the Circuit Court of Appeals for the First Circuit, in *Weightman* v. *United States, supra* (p. 191):

> In view of the breadth of the war power as indicated by the above cases and the cases cited therein, we have no doubt that the system devised for the treatment of persons who by reason of religious training and belief are conscientiously opposed to participation in war in any form does not deprive them of any of their constitutional rights even though, in practical effect, it deprives them of their full liberty and *requires them to work at a rate of compensation far below what could be earned in civilian*

> *life and even below what could be earned in the armed forces.* [Italics supplied.]

The duty of citizens to render military service when necessary to defend the Government against its enemies is well recognized. *Selective Draft Law Cases, supra; United States* v. *Macintosh, supra; Jacobson* v. *Massachusetts, supra.* In *Selective Draft Law Cases, supra,* the Supreme Court said (p. 378):

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force. * * *

Again, as stated by the Supreme Court in *United States* v. *Macintosh, supra* (p. 620):

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

Appellant's contention that when he was taken into the Army he became a slave or serf and was subjected to involuntary servitude, in violation of the Thirteenth Amendment, is plainly without merit. *Selective Draft Law Cases, supra; Hopper* v. *United States, supra,* p. 186; *Kramer* v. *United States, supra.* In disposing of this contention, in *Selective Draft Law Cases, supra,* the Supreme Court said (p. 390):

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Also, as stated by this court in *Hopper* v. *United States, supra* (p. 186):

> Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. * * *.

II

The United States has not consented to be sued to enforce a claim for compensation for military service and the court lacked jurisdiction

The United States has not consented to be sued in a case of this character and the court plainly lacked jurisdiction. *Lynch* v. *United States,* 292 U. S. 571; *Reid* v. *United States,* 211 U. S. 529; *Schillinger* v. *United States,* 155 U. S. 163; *Coleman* v. *United*

States, 100 F. (2d) 903 (C. C. A. 6th). As stated by the Supreme Court in *Lynch* v. *United States, supra* (pp. 581–582):

> The rule that the United States may not be sued without its consent is all embracing.
>
> * * * * *
>
> The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, *DeGroot* v. *United States,* 5 Wall. 419, 431; *United States* v. *Babcock,* 250 U. S. 328, 331; and to those arising from some violation of rights conferred upon the citizen by the Constitution, *Schillinger* v. *United States,* 155 U. S. 163, 166, 168. * * *. For immunity from suit is an attribute of sovereignty which may not be bartered away.

In *Schillinger* v. *United States, supra,* the Supreme Court said (p. 166):

> The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.

Also, as pointed out by the lower court in disposing of appellant's contention that the court has jurisdiction by virtue of the Fifth Amendment, Federal Dis-

trict Courts have only such jurisdiction as Congress may give them, and they have not been vested with jurisdiction to entertain suits of this character. *Lockerty* v. *Phillips,* 319 U. S. 182.

Finally, as the lower court has pointed out, Congress has created rights against the United States for disabilities contracted in the military service in the enactment of the World War Veterans' Act (38 U. S. C. 421, et seq.) and similar legislation, and, in so doing, was under no obligation to provide a remedy in the courts. *Lynch* v. *United States, supra.* Suits upon compensation claims may not be maintained. *Silberschein* v. *United States,* 266 U. S. 221; *Crouch* v. *United States,* 266 U. S. 180.

CONCLUSION

As the appellant failed to state a cause of action and the court was without jurisdiction, it is respectfully submitted that the judgment of dismissal should be affirmed.

JOHN B. TANSIL,
United States Attorney.
FRANCIS J. McGAN,
Attorney, Department of Justice.
JOHN F. SONNETT,
Assistant Attorney General.
SEARCY L. JOHNSON,
Special Assistant to the Attorney General.
D. VANCE SWANN,
Attorney, Department of Justice.
THOMAS E. WALSH,
Attorney, Department of Justice.

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NO. 11404

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD C. COMMERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Montana

JOHN W. MAHAN,
Helena, Montana, and
CHARLES E. PEW,
Helena, Montana,
Attorneys for Petitioner and Appellant.

JOHN B. TANSIL,
United States Attorney, Billings, Montana;
HARLOW PEASE,
Assistant United States Attorney, Butte, Montana;
FRANCIS J. McGAN,
Attorney, Department of Justice, Butte, Montana,
Attorneys for Respondent and Appellee.

JOHN F. SONNETT,
Assistant Attorney General.
SEARCY L. JOHNSON,
Special Assistant to the Attorney General.
D. VANCE SWANN,
Attorney, Department of Justice.
THOMAS E. WALSH,
Attorney, Department of Justice.

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JOHN W. MAHAN,
Helena, Montana, and
CHARLES E. PEW,
Helena, Montana,
Attorneys for Petitioner and Appellant.

JOHN B. TANSIL,
United States Attorney, Billings, Montana;
HARLOW PEASE,
Assistant United States Attorney, Butte, Montana;
FRANCIS J. McGAN,
Attorney, Department of Justice, Butte, Montana,
Attorneys for Respondent and Appellee.

JOHN F. SONNETT,
Assistant Attorney General.
SEARCY L. JOHNSON,
Special Assistant to the Attorney General.
D. VANCE SWANN,
Attorney, Department of Justice.
THOMAS E. WALSH,
Attorney, Department of Justice.

The brief of Appellee does not meet the contentions of Appellant at any point.

I.

We raise no question as to the validity of the Selective Service Acts. In lines 9 and 10 of page 46 of our initial brief we say: "We do not question *the power or the duty* of Congress to raise and equip armies for defense."

We add, however:

> "But we do question the right of Congress or of our people to conscript our boys to fight a war without assuming responsibilitity to them for the damage done to their bodies and their earning power in our defense—a portion of their lives expended in a public use—the same as we are responsible *to those who furnish equipment for our armies.*"

II.

Nor do the cases cited under Subdivision II of Appellee's brief make contact with the case we have made upon the right to sue.

Reid vs. U. S., 211 U. S. 529; Schillinger vs. U. S., 155 U. S. 163; De Groot vs. U. S., 5 Wall. 419, and U. S. vs. Babcock, 250 U. S. 328, are all Court of Claims cases, in which the only possible question which could be decided was whether the facts brought them within the Court of Claims Act. The Court of Claims being a court of limited and special jurisdiction it could not try any claim not coming within the enabling provisions of the Act.

Anything said by the Court in any of those cases beyond the needs of the case is *obiter dictum*.

Lynch vs. U. S., 292 U. S. 571; Silberschein vs. U. S., 266 U. S. 221, and Crouch vs. U. S., 266 U. S. 180, were all based upon the World War Veterans Act, and with the exception of the Lynch case involved no basic constitutional question such as is here presented. In the Lynch case the Court held the provisions of the Economy Act which repealed the War Risk Insurance provisions to be unconstitutional.

In Lockerty vs. Phillips, 319 U. S. 182, which dealt with the Emergency Price Control Act of 1942, the Court said that the plaintiff had taken the wrong route to the Supreme Court, in effect, however, holding that judicial review could not be prevented. The Court said:

> "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."

The reason counsel cannot cite decisions of the Supreme Court adverse to our contention is that there are none.

U. S. vs. Lee, 16 Otto 196, was decided in 1882. It is not necessary or profitable to search the decisions prior to the date of the Lee case, as that decision established the law as of that date.

The Lee case is conclusive upon the proposition that the United States may be sued without the consent of Congress upon a cause of action arising directly under

the Fifth Amendment, even though the United States was not named a party defendant. The effect of the decision was to eject the United States.

> "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party to the record, *but by the effect of the Judgment or decree which can here be rendered.*"
>
> Louisiana vs. McAdoo,
> 234 U. S. 627

Clearly the Lee case is absolute authority for our position.

The only case since the Lee case which passes upon the same question is Great Falls Mfg. Co. vs. U. S., 112 U. S. 645, decided three years before any consent to suit upon the constitution had been given by Congress.

It is also worthy of note that both the Lee case and the Great Falls Manufacturing Company case were accidents. That is to say, each arose over a disputed question of fact and of law. Congress has never attempted to confiscate insensate property for government use. It always provides for compensation if it deliberately takes such property. This accounts for the few caess in which the question of the right to sue upon a constitutional provision has arisen.

Furthermore, the prohibition against taking private property for public use without just compensation *is the only provision of the constitution or of its amendments*

which may in the final analysis require suit against the United States for its enforcement.

IN GENERAL

At no time have the constitutional rights of our war disabled been presented to any federal court for definition until the instant case was instituted.

The first question to be determined is whether the bodily integrity and earning power of a citizen can be destroyed or impaired in the public service without just compensation; in other words, whether the provisions of the Fifth Amendment were designed for the sole benefit of the profit making citizen, or whether they were designed to benefit *any* citizen whose property is taken for a public use.

Whether the 1A who is capable of making a good living by his earning power may be despoiled of that property, while the 4F who makes the same kind of a living from insensate property must be paid for his property, if taken for a public use.

Whether the power of eminent domain, when exercised in taking insensate property for public use, is coupled with the requirement that just compensation be paid, but when used to take the body of the citizen for war is coupled with no obligation to make restitution if bodily integrity and earning power are impaired or destroyed.

The requirements of "patriotism" are not as narrow as implied by the District Court.

"Patriotism", as defined by Webster, is an obligation of *all* citizens, not alone the soldier.

If it requires the gratuitous sacrifice of the body by the soldier—that is, without a reciprocal obligation to recompense—then it requires the gratuitous contribution by the civilian of his insensate property.

That the body of the citizen and his earning power are property, and that this property belongs to him, is admitted for the purposes of the motion to dismiss.

Indeed, this is true as a matter of law.

> "The right of property in a slave is distinctly and expressly affirmed in our Constitution. The right to traffic in it, like an ordinary article of merchandise and property, is also guaranteed to the citizens of the United States," etc.
>
> Scott vs. Sandford,
> 19 Howard 393.

This decision established beyond cavil that the human body is property and susceptible of ownership.

When the 13th Amendment ended slavery Dred Scott became the owner of his body and of his earning power, and instead of Sandford being able to trade in his body and his earning power, Scott could trade in it himself. The title to his body and his earning power reverted to him, and not to the United States, as the prohibition of the 13th Amendment extends to the United States as well as to its citizens. The United States does not own its citizens. That is a prerogative only of totalitarian states.

So, when the Declaration of Independence was made effective by the success of the Revolution, the citizen of the United States became a free man, the owner and proprietor of his body and the owner of his earning power, a commodity of the highest grade, as is evidenced by current events. Cities are dark and cold for want of the producing power of man.

The question of the forum in which suits by disabled veterans may be tried is not a matter for consideration at this time. It will arise when such a suit is brought.

However, the district court, the successor of the circuit court in which the Lee case and the Great Falls Manufacturing Company case were tried, is good enough for us.

Sec. 41, Title 28, U. S. C.

* * *

Counsel say that Congress has created "rights" by the World War Veterans Act of 1924.

That act created no "rights." It simply provided for charitable donations.

Furthermore, counsel apparently do not know that the World War Veterans Act was repealed *in toto* by the Economy Act of March 20, 1933, ironically styled "An Act to Maintain the Credit of the United States Government", but in reality an act to despoil the disabled war veteran.

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* * *

The Appellant, in common with the rest of the two or three million disabled men and women of World Wars I and II, has the right to have the questions presented by the petition determined as original propositions, untrammeled by the *obiter dicta* pronounced by the Supreme Court in cases not in point.

More human rights and human injustice is involved in this case than in all the cases decided by the Supreme Court during the entire period of its existence—including the Dred Scott case.

We submit that petitioner is entitled to a judgment as prayed for in his petition.

Respectfully,

JOHN W. MAHAN
C. E. PEW
Attorneys for Appellant.